

Refining a proposed tax mediation regime for
New Zealand's tax disputes resolution procedures:
A mixed methods study

A thesis submitted in partial fulfilment of the requirements

for the Degree

of Master of Commerce in Taxation

in the University of Canterbury

by Melinda Jone

University of Canterbury

2013

Table of Contents

List of Figures	vi
List of Tables	vii
Acknowledgements	viii
Note	ix
Abstract	x

Chapter 1: Introduction

1.1 Background to the Topic	1
1.2 Purpose of the Research	4
1.3 Importance of the Research	7
1.4 Structure of the Thesis	9

Chapter 2: Literature Review: Tax Disputes Resolution

2.1 Introduction	10
2.2 Background to the Current New Zealand Tax Disputes Resolution Procedures	10
2.3 The New Zealand Tax Disputes Resolution Procedures	16
2.3.1 The Term ‘Tax Dispute’ in New Zealand	16
2.3.2 The Current Tax Disputes Resolution Procedures	17
2.4 The Care and Management Provisions and the Settlement of Tax Disputes in New Zealand	25
2.5 Selected Tax Compliance Literature	32
2.5.1 Taxpayers’ Perceptions of Fairness	32
2.5.2 Revenue Authority Contact	36
2.6 Alternative Dispute Resolution and Mediation Definitions in the Context of Tax Disputes Resolution	40
2.7 Summary	47

Chapter 3: Literature Review: Selected Issues in Mediation

3.1 Introduction	48
3.2 Interest-based and Rights-based Disputes	49
3.3 Facilitative and Evaluative Mediation	50
3.4 Mediation in Commercial Disputes and Tax Disputes	52
3.5 Mediation Rhetoric and Reality	54
3.5.1 Focusing on Settlement	55
3.5.2 Prolonging Mediation Until Settlement is Reached	56
3.5.3 Power Imbalances	57
3.5.4 The Anti-litigation Discourse	58
3.5.5 Other Issues	59
3.6 Summary	62

Chapter 4: Literature Review: Jone and Maples’ (2012b) Proposed New Zealand Tax Mediation Regime

4.1 Introduction	63
4.2 Key Features of the Mediation Regime	63
4.3 Process and Timeframes of the Mediation Regime	67
4.4 Other Issues.....	72
4.5 Summary	75

Chapter 5: Research Methods

5.1	Introduction	77
5.2	Mixed Methodological Approach	77
5.3	Sample Selection	80
5.4	Ethical Considerations	82
5.5	Quantitative Component	82
5.5.1	Survey Questionnaire Administration Method	82
5.5.2	Survey Questionnaire Design	85
5.5.3	Pilot Testing	86
5.5.4	Quantitative Data Collection Procedures	88
5.5.5	Descriptive Analysis of Quantitative Data	90
5.6	Qualitative Component	91
5.6.1	Focus Group Interviews	91
5.6.2	Focus Group Sample Selection	94
5.6.3	Focus Group Composition	94
5.6.4	Focus Group Size	96
5.6.5	Number of Groups	98
5.6.6	The Research Team	99
5.6.6.1	The Moderator	100
5.6.6.2	Note-taker (Assistant Moderator)	102
5.6.7	Focus Group Questioning Route	103
5.6.8	Recording of Focus Group Discussion	105
5.6.9	Length of Focus Group Sessions	106
5.6.10	Conduct of the Focus Group	106
5.6.11	Qualitative Data Analysis	109
5.6.12	Qualitative Data Analysis Limitations	114
5.7	Summary	115

Chapter 6: Research Results: Survey Questionnaire

6.1	Introduction	117
6.2	Response Analysis	117
6.2.1	Response Periods Analysis	118
6.2.2	Response Rate	119
6.3	Descriptive Statistical Analysis of Survey Questionnaire Responses	121
6.4	Comments Received from Survey Respondents	132
6.4.1	General Comments	133
6.4.2	Comments on Survey Questions	134
6.5	Summary	138

Chapter 7: Research Results: Focus Group Interview

7.1	Introduction	139
7.2	Composition of the Focus Group	139
7.3	The Focus Group Discussion	140
7.3.1	General Comments	140
7.3.2	Changes to Legislation	142
7.3.3	The Mediator	143
7.3.4	Confidentiality of the Mediation	146
7.3.5	Mandatory Mediation	146
7.3.6	Stage of the Mediation Phase	147

7.3.7	Types of Disputes Suitable for Mediation	150
7.3.8	Funding of the Mediation Services	152
7.3.9	Number of Times Mediation Should Occur	153
7.3.10	The Ability for the Mediator to Recommend a Solution	154
7.3.11	Number of People at Mediation and People with Authority to Settle at Mediation	155
7.3.12	Culture Change of Inland Revenue	157
7.4	Summary	159

Chapter 8: Discussion of Results: Refined Proposed New Zealand Tax Mediation Regime

8.1	Introduction	161
8.2	Synthesis of Research Findings	161
8.2.1	The Mediator	161
8.2.2	Confidentiality of the Mediation	162
8.2.3	Mandatory Mediation	163
8.2.4	Stage of the Mediation Phase	164
8.2.5	Types of Disputes Suitable for Mediation	164
8.2.6	Funding of the Mediation Services	165
8.2.7	Number of Times Mediation Should Occur	165
8.2.8	The Ability for the Mediator to Recommend a Solution	166
8.2.9	Whether Parties Should be Able to Reject the Mediator's Recommendation	166
8.3	The Refined Proposed New Zealand Tax Mediation Regime	166
8.4	Other Issues	179
8.4.1	Resource and Cost Limitations	179
8.4.2	Shortfall Penalties and Debt Remission	180
8.4.3	Number of People at Mediation and People with Authority to Settle at Mediation	182
8.4.4	Culture Change of Inland Revenue	183
8.4.5	Willingness and Ability to Settle	184
8.4.6	Implementation and Promotion	185
8.5	Summary	187

Chapter 9: Conclusions, Limitations and Future Research

9.1	Introduction	188
9.2	Conclusions	188
9.2.1	Purpose	188
9.2.2	The Refined Proposed Regime and Jone and Maples' (2012b) Proposed Regime	189
9.2.3	Mediation and Facilitated Conferences	192
9.3	Contribution to the Literature	195
9.4	Implications for the Tax Authority and Others	196
9.5	Limitations and Areas for Future Research	198
9.5.1	Limitations of the Research Method	198
9.5.2	Limitations of the Refined Proposed Tax Mediation Regime	199

References	202
-------------------------	-----

Appendices

Appendix 1:	University of Canterbury Human Ethics Committee Approval Letter	219
Appendix 2:	Sample of the Survey Questionnaire	220
Appendix 3:	Samples of the Covering Letters to the Survey Questionnaires	236
Appendix 3.1:	Covering Letter to the Canterbury Participants	236
Appendix 3.2:	Covering Letter to the Non-Canterbury Participants	238
Appendix 4:	Sample of the Pre-Notification Email	239
Appendix 5:	Samples of the Covering Emails to the Survey Questionnaires	240
Appendix 5.1:	Covering Email Accompanying the Survey Questionnaire to the Canterbury Participants	240
Appendix 5.2:	Covering Email Accompanying the Survey Questionnaire to the Non- Canterbury Participants	241
Appendix 6:	Samples of the Follow-Up Emails	242
Appendix 6.1:	Follow-Up Email to the Canterbury Non-Respondents	242
Appendix 6.2:	Follow-Up Email to the Non-Canterbury Non-Respondents	243
Appendix 6.3:	Second Follow-Up Email to Selected Non-Respondents	244
Appendix 7:	Sample of the Focus Group Consent Form	245
Appendix 8:	Focus Group Questioning Route	246
Appendix 9:	Questions for Video Conference with Inland Revenue Staff	248

List of Figures

Figure 2.1	New Zealand Tax Disputes Resolution Process Commenced by the Commissioner of Inland Revenue	23
Figure 2.2	New Zealand Tax Disputes Resolution Process Commenced by a Taxpayer	24
Figure 2.3	The “Slippery Slope” Framework	35
Figure 2.4	The Australian Taxation Office’s Compliance Model	39
Figure 4.1	Jone and Maples’ (2012b) Proposed New Zealand Tax Disputes Resolution Process Commenced by the Commissioner of Inland Revenue	68
Figure 4.2	Jone and Maples’ (2012b) Proposed New Zealand Tax Disputes Resolution Process Commenced by a Taxpayer	69
Figure 6.1	Frequency of Responses to Question One: The mediator should be selected from a specialist panel of tax mediators independent of Inland Revenue	122
Figure 6.2	Frequency of Responses to Question Two: Information exchanged during the mediation process should be confidential (that is, not able to be used in a later hearing)	123
Figure 6.3	Frequency of Responses to Question Three: Mediation should be a mandatory phase of the tax disputes resolution process	124
Figure 6.4	Frequency of Responses to Question Four: The mediation phase should occur after the NOR stage of the tax disputes resolution process	125
Figure 6.5	Frequency of Responses to Question Five: Certain types of tax disputes should be able to be excluded from the mediation process (as outlined in Table 1)	126
Figure 6.6	Frequency of Responses to Question Six: The mediation services provided should be at no cost to the taxpayer unless a private mediator is engaged by the parties	127
Figure 6.7	Frequency of Responses to Question Seven: The mediation phase should occur only once in the tax disputes resolution process	129
Figure 6.8	Frequency of Responses to Question Eight: At the request of the parties to the dispute, the mediator should be able to make a recommendation on the resolution of the dispute	130
Figure 6.9	Frequency of Responses to Question Nine: The parties should be able to reject the mediator’s recommendation	131
Figure 6.10	General Comments	133
Figure 6.11	Comments on Specific Survey Questions	134
Figure 8.1	New Zealand Tax Disputes Resolution Process Incorporating the Refined Proposed Mediation Phase	175

List of Tables

Table 4.1	Suggested Key Features of Jone and Maples' (2012b) Proposed Tax Mediation Regime	66
Table 5.1	Guide for the Wording of Survey Questions	87
Table 5.2	Characteristics of a Good Moderator	101
Table 5.3	Focus Group Data Analysis Types	110
Table 5.4	Classic Analysis Strategy	112
Table 5.5	Focus Group Analysis Tips	115
Table 6.1	Responses Received by Period of Receipt	119
Table 6.2	Response Rates by Respondent Type	119
Table 6.3	Frequency of Responses to Question One: The mediator should be selected from a specialist panel of tax mediators independent of Inland Revenue	122
Table 6.4	Frequency of Responses to Question Two: Information exchanged during the mediation process should be confidential (that is, not able to be used in a later hearing)	123
Table 6.5	Frequency of Responses to Question Three: Mediation should be a mandatory phase of the tax disputes resolution process	124
Table 6.6	Frequency of Responses to Question Four: The mediation phase should occur after the NOR stage of the tax disputes resolution process	125
Table 6.7	Frequency of Responses to Question Five: Certain types of tax disputes should be able to be excluded from the mediation process (as outlined in Table 1)	126
Table 6.8	Frequency of Responses to Question Six: The mediation services provided should be at no cost to the taxpayer unless a private mediator is engaged by the parties	127
Table 6.9	Frequency of Responses to Question Seven: The mediation phase should occur only once in the tax disputes resolution process	129
Table 6.10	Frequency of Responses to Question Eight: At the request of the parties to the dispute, the mediator should be able to make a recommendation on the resolution of the dispute	130
Table 6.11	Frequency of Responses to Question Nine: The parties should be able to reject the mediator's recommendation	131
Table 8.1	Refined Suggested Key Features of Jone and Maples' (2012b) Proposed Tax Mediation Regime	167

Acknowledgements

Firstly, I wish to thank my supervisors Associate Professor Andrew Maples and Mr Alistair Hodson for the guidance and advice that they provided throughout the course of this study. In particular, thank you Andrew for reviewing the many drafts of this thesis and for your suggestions for improvements. I also wish to acknowledge Professor Adrian Sawyer from the Department of Accounting and Information Systems at the University of Canterbury and Professor Margaret McKerchar from the University of New South Wales, Sydney, respectively, for their input and advice in relation to the research methods utilised in this study. I am also grateful for the advice in the mediation area provided by negotiation and conflict resolution practitioner and trainer, Ms Jane Chart.

In addition, I wish to acknowledge the tax and mediation practitioners who took part in the survey questionnaire pilot. I extend my gratitude to the tax and mediation practitioners who willingly participated in the final survey questionnaire and to the five focus group participants who gave up their valuable time to contribute their views. Thank you also to the focus group moderator for your involvement in facilitating the focus group.

I further wish to thank Mr Ross Baxter and Mr Chris Bond from the Inland Revenue Department for their interest in this study and for affording me their time to answer my questions. Sincere appreciation goes to Anne and Matt for proof-reading the thesis in its final stages. A final recognition goes to Sir Ivor Richardson for the contribution of his comments.

Note

The material and references in this thesis relating to the alternative dispute resolution (ADR) processes of HM Revenue and Customs and the Australian Taxation Office reflect the current developments and opinions expressed on the ADR processes in these tax authorities up until 31 May 2013. Also note that, with respect to the current New Zealand tax disputes resolution procedures, as at 31 May 2013, the planned 2013 ministerial review of the New Zealand tax disputes resolution procedures was yet to be completed (and released for public consultation and discussion).

The citation style used in this thesis is largely sourced from the New Zealand Law Foundation's McLay G, Murray C and Orpin G *New Zealand Law Style Guide* (2nd ed, Thompson Reuters, Wellington, 2011).

Abstract

The current New Zealand tax disputes resolution procedures were enacted in 1996 following a recommendation made by the Organisational Review Committee of the Inland Revenue Department in 1994. Yet, following their enactment and despite a number of positive aspects to the disputes resolution procedures, commentators and professional bodies alike have continued to raise concerns that inefficiencies, particularly with respect to time and cost, are affecting their operation and are, consequently, adversely impacting on taxpayers' perceptions of the fairness of the procedures. It is believed that this is potentially negatively impacting on the tax system and on taxpayer voluntary compliance. Consequently, suggestions have been made for the use of alternative disputes resolution procedures, such as mediation, as another method to resolve tax disputes.

The objective of this study is to develop a refined tax mediation regime for New Zealand through improving the features of the proposed tax mediation regime for New Zealand's tax disputes resolution system first developed by Jone and Maples (2012b). Utilising a sequential mixed methods approach, consisting of a quantitative survey questionnaire followed by a qualitative focus group interview, this study seeks feedback on Jone and Maples' (2012b) proposed New Zealand tax mediation regime from purposively selected practitioners (experts) in the tax disputes resolution and mediation fields. The feedback obtained is used in refining Jone and Maples' (2012b) proposed tax mediation regime.

This study finds that the most important aspect of the refined proposed regime is the inclusion of a mediator who is independent of both parties and moreover, that the mediator is foremost trained and qualified in mediation as opposed to being a specialist in tax law. The findings also indicate that mediation should not be made a mandatory phase of the disputes

procedures. This study recommends that the refined tax mediation regime should be an administrative phase and incorporated with the existing conference phase in a proposed 'ADR stage' of the disputes procedures. Notwithstanding the potential budgetary and resource constraints, the findings indicate that if mediation were to be provided as a cost-free service, taxpayers (particularly small taxpayers) should be appreciative of the opportunity to put their cases forward and be heard, even if an agreement has not been reached through mediation. The literature suggests that this should in turn enhance taxpayers' perceptions of fairness of the disputes procedures and thereby voluntary compliance. This study provides a foundation for the further development of tax mediation in New Zealand.

Chapter 1

Introduction

1.1 Background to the Topic

The current tax disputes resolution procedures¹ in New Zealand were enacted in 1996 following a recommendation made by the Organisational Review Committee of the Inland Revenue Department,² chaired by Sir Ivor Richardson (hence, also known as the Richardson Committee),³ in 1994. The Richardson Committee believed that the disputes resolution procedures then in place were deficient and proposed a new tax disputes process aimed at resolving disputes fairly and expeditiously. Despite a number of subsequent reviews of the procedures that were enacted, New Zealand commentators continue to raise concerns that inefficiencies with respect to time and cost are affecting their operation. It is believed that these various issues are potentially impacting on taxpayers' perceptions of the fairness of the procedures and are having a negative impact on the tax system. Commentators and professional bodies alike believe that fundamental changes are necessary to make the disputes resolution procedures achieve the objectives that were established by the Richardson Committee and operate in a workable manner.

Given the above concerns, one suggestion has been the adoption of mediation as an alternative method to resolve disputes. Keating (2008) suggests that tax disputes should be resolved using a mediation regime that is similar to the regimes applied to family and

¹ For the purpose of referring to disputes resolution in this study, the terms "procedure" and "process" are used interchangeably.

² Hereafter referred to as "Inland Revenue" or "IRD".

³ Sir Ivor Richardson was appointed a judge of the High Court in 1977 and then to the Court of Appeal in the same year. He was President of the Court of Appeal from 1996–2002. Sir Ivor was also widely regarded as an expert on tax administration and had, prior to his appointment to the bench, been a practitioner and academic specialising in tax. See Carter D and Palmer M (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002).

employment law disputes. He believes that there should be compulsory mediation of all tax disputes before a member of the Taxation Review Authority (TRA) and in the event that agreement or resolution is not possible, the dispute would be referred to “a different TRA judge” for judicial determination (Keating, 2008, p 455).

Following Keating’s (2008) suggestions, Peck and Maples (2010, p 359) outline a “small disputes settlement process” whereby parties would meet before a “tax expert” whose role would be to “provide a facilitated forum for the two parties to resolve the dispute” and if resolution was not possible, the tax expert would then make a binding determination. Peck and Maples (2010, p 365) note that “tax experts would therefore need mediation and dispute resolution skills.”

TRA Judge Barber, as noted in the Taxation Committee of the New Zealand Law Society (NZLS) and the National Tax Committee of the New Zealand Institute of Chartered Accountants (NZICA) joint submission (NZLS/NZICA, 2010), provides two options for which micro disputes under \$50,000 could be progressed. One alternative was to have “specialist tax mediators” to provide parties with a “reality check by an independent third party”, and if the matter was not resolved then a “suitably experienced tax arbitrator” would make a final decision (NZLS/NZICA, 2010, para 3.54). The other alternative suggested by his Honour, was to have a mediation run by the TRA who “would not be disqualified from hearing the case if it were not resolved at mediation” (NZLS/NZICA, 2010, para 3.54).

Also, a submission by PricewaterhouseCoopers (PwC) (2011, p 3) on the Taxation (Tax Administration and Remedial Matters) Bill 2010 (the Bill) asserted that “the Government should undertake a wider review of the current disputes process” and submitted that the

Government should consider changing the disputes process to include, inter alia: “the involvement of a facilitator/mediator who is independent of Inland Revenue in both the early and later stages of the process” and “improvements to the way information is exchanged between parties and ... This exchange should be part of an appropriate alternative disputes resolution [(ADR)] method e.g. ... mediation.”⁴

However, these suggestions for the use of mediation in the New Zealand tax disputes resolution system had not subsequently been considered in-depth. In the light of this gap, Jone and Maples (2012b) further developed the suggestions made by New Zealand commentators for a tax mediation regime in New Zealand’s tax disputes resolution system by providing recommendations as to the possible features for such a regime.⁵ Their recommendations were guided and informed largely by a documentary analysis of the experiences of the United States of America (United States) and Australia with tax mediation. The authors consequently proposed a mandatory tax mediation regime for New Zealand administered by an enhanced TRA and utilising a panel of specialist tax mediators independent of Inland Revenue. Furthermore, Jone and Maples (2012b, p 442) concluded that the proposed tax mediation regime “must be accompanied by a culture change within the tax authority” and that the existence of “a genuine, good faith commitment” to the mediation process on the part of both the revenue authority and taxpayers alike was required.

⁴ More recently Russ and Davies also suggest that “the New Zealand tax disputes process would greatly benefit from the inclusion of an ADR element ... including the appointment of trained mediators.” See Russ N and Davies S “A better way of resolving tax disputes” (May 2013) *Australasian Legal Business Magazine* 9 at 9.

⁵ See Chapter 4 for an outline of Jone and Maples’ (2012b) proposed New Zealand tax mediation regime. Jone and Maples’ (2012b) proposed New Zealand tax mediation regime was originally developed by the researcher of this current study as part of a BCom (Hons) research project undertaken in 2011 under the supervision of Andrew Maples and was subsequently published as Jone M and Maples AJ “Mediation as an alternative option in New Zealand’s tax disputes resolution procedures” (2012b) 18 *New Zealand Journal of Taxation Law and Policy* 412 (and republished as Jone M and Maples AJ “Mediation as an alternative option in the tax disputes resolution procedures: Part 1” *Taxation Today* 59 (Wellington, February 2013a) 14 and Jone M and Maples AJ “Mediation as an alternative option in the tax disputes resolution procedures: Part 2” *Taxation Today* 60 (Wellington, March 2013b) 12).

It should be noted that Inland Revenue implemented “a number of administrative enhancements to the disputes resolution process to improve the timeliness of the process and provide certainty for disputants”, effective from 1 April 2010 (IRD, 2010a, p 1). Included in these changes was the introduction of the option for taxpayers to have any conference meetings (a non-statutory phase of the disputes process) facilitated by an internal Inland Revenue facilitator (IRD, 2011b, para 145; IRD, 2011c, para 176). However, conference facilitation can be distinguished from mediation in the respect that the purpose of the facilitated conference is not to find a “mediated settlement” (Griffiths, 2012a, p 11), but rather to allow for the “exchange of material information relating to the dispute” and provide an “opportunity for the parties to the dispute to try to resolve the differences in their understanding of facts, law and legal arguments” (IRD, 2011b, para 140; IRD, 2011c, para 171). Moreover, in the past it has been observed that Inland Revenue have tended to approach the conference as “an opportunity to gather evidence, as opposed to [a forum for] dispute resolution” (NZLS/NZICA, 2008, para 3.12).

1.2 Purpose of the Research

This study aims to develop a refined tax mediation regime for New Zealand through improving the features of Jone and Maples’ (2012b) proposed New Zealand tax mediation regime. To achieve this objective, this study seeks feedback from selected New Zealand practitioners specifically in the areas of tax disputes resolution or mediation, on the proposed regime. This study will employ a sequential mixed methods approach whereby the qualitative method of a focus group interview will be used to inform and enrich the findings of the quantitative method of a survey questionnaire. An analysis of the findings from the survey

responses and the focus group interview will be used to refine the features of Jone and Maples' (2012b) proposed tax mediation regime for New Zealand.⁶

Jone and Maples' (2012b) proposed regime was based solely on the analysis of documentary evidence gathered by the researchers, including journal articles, submissions and reports. Yin (2003, p 82) states that the main weakness of documentary information is that "it is produced for a specific purpose and a specific audience other than those of the study being done" and that the documentary evidence may "reflect communications among parties attempting to achieve some other objectives." Jone and Maples (2012b) did not gain evidence via other means such as from interviews with, and/or surveys of practitioners or academics in either of the specialist areas of tax disputes resolution or mediation. It follows that there was a limited amount of practical knowledge and experience (in the areas of tax disputes resolution or mediation) which was used to inform the suggested features of the researchers' proposed New Zealand tax mediation regime. This present study aims to address this limitation by seeking the views of selected New Zealand tax practitioners and mediation practitioners on Jone and Maples' (2012b) proposed regime through utilising both a survey questionnaire and a focus group interview.

While it is acknowledged that there are some positive aspects to the current New Zealand disputes resolution procedures,⁷ various New Zealand commentators have identified that

⁶ Additional information, in the context of Inland Revenue's current dispute resolution procedures (primarily focusing on facilitated conferences), was also obtained by the researcher through a video conference held with Inland Revenue staff. The purpose of the discussion was in order to provide a contextual background to, as well as to clarify the researcher's understanding of, certain issues that arose in the findings from the survey questionnaire and the focus group interview. Note that, feedback from Inland Revenue with respect to Jone and Maples' (2012b) proposed New Zealand tax mediation regime (as well as the subsequent refined proposed New Zealand tax mediation regime) was not able to be obtained.

⁷ For example, the objective of the Richardson Committee of promoting an "all cards on the table" approach has to some degree been achieved in that parties now progress to court with a greater awareness of each other's points of view. Arguably, opportunities for "trial by ambush" where one party could choose to withhold key

there clearly are a number of issues concerning the operation of aspects of the tax disputes procedures. Consistent with the approach of Jone and Maples' (2012b) study, it is not the purpose of this study to solve these various issues. This study does not seek to reform the New Zealand tax disputes resolution procedures as a whole. Instead, the aim of this study is to refine a suggested alternative method to be employed within the existing New Zealand tax disputes resolution framework in an endeavour to improve its operation and consequently, positively impact on taxpayers' perceptions of fairness and thereby enhance voluntary compliance. Encouraging voluntary compliance is consistent with the approach behind Inland Revenue's Compliance Model of "making compliance easy" for most individuals and businesses (IRD, 2012d, p 3).⁸

Through utilising a mixed methods research approach, employing both a survey questionnaire and a focus group interview, this study contributes to current dialogue in the public sphere on the concerns raised with respect to the current operation of aspects of the New Zealand tax disputes procedures. Specifically, this is achieved through drawing on the views of those practitioners that are most closely involved with the tax disputes resolution procedures and represent taxpayers in dispute matters. In addition, this study also seeks the views of those involved in the mediation field in New Zealand. Implicitly, the conclusions drawn in this study will be limited to the (assumed well-informed) views of the aforementioned practitioners that have been selected for this study.

information until the dispute has reached the courts have also been reduced: Peck J and Maples AJ "Comment: The tax disputes resolution process in New Zealand: What about the little fellas?" (2010) 16 New Zealand Journal of Taxation Law and Policy 348 at 365.

⁸ See Chapter 2, Section 2.5.2 for a further discussion on Inland Revenue's Compliance Model. See also, Inland Revenue's current compliance focus document: Inland Revenue *Helping you get it right: Inland Revenue's compliance focus 2012-13* (IR 504, Wellington, August 2012d) ["IR 504"].

Consistent with Jone and Maples (2012b, p 442), the researcher acknowledges that mediation should not be considered as a “panacea” for resolving tax disputes. While there are clearly many benefits associated with mediation, it is acknowledged that various concerns exist, *inter alia*, with respect to the applicability of mediation for certain types of disputes (including tax disputes), as well as issues with the way in which mediation, in general, is practiced in the field (see Chapter 3). However, it is beyond the scope of this study to solve these various issues. The current use of mediation by overseas revenue authorities establishes an acceptance of mediation in resolving tax disputes. In addition, the suggestions for tax mediation made by various New Zealand tax commentators and professional bodies as well as Inland Revenue’s inclusion of the option of conference facilitation, provide a sound basis for arguing that the use of mediation in New Zealand’s tax disputes resolution procedures is an option that warrants further consideration.

Nevertheless, the following key limitations with respect to the use of tax mediation in New Zealand should be noted: first, that mediation will only be effective if both parties are willing to compromise; and second, that the current Inland Revenue policy with respect to the application of the care and management responsibilities of the Commissioner of Inland Revenue (the Commissioner) to settlements (and compromise) generally does not support the early settlement of tax disputes (see Chapter 2, Section 2.4).

1.3 Importance of the Research

This study responds to concerns with respect to the operation of the tax disputes resolution system in New Zealand and to calls by both commentators and professional bodies alike that changes to various aspects of the tax disputes resolution procedures are necessary. Moreover, “the way tax disputes are resolved is critical to taxpayer perceptions of fairness, and has

wider impacts for the tax administration” (Richardson Committee, 1994, para 10). Given the self-assessment nature of New Zealand’s tax system, perceptions of tax fairness are integral to ensuring voluntary taxpayer compliance. Accordingly, an enhanced awareness and understanding of the impact of the tax disputes resolution process (potentially incorporating mediation) on tax fairness is important in order for the tax authority to improve the tax system and consequently encourage taxpayer compliance.

This research is also of relevance given the increasing global trend towards utilising alternative forms of dispute resolution, such as mediation, in resolving tax disputes (Ernst & Young, 2010). There is a growing recognition by both taxpayers and tax administrations around the world that “ADR may allow more tax disputes to be resolved earlier, or avoided altogether, thereby giving both parties greater certainty and the ability to channel scarce resources into more productive activities” (Ernst & Young, 2010, p 4).⁹ Against this background, this present study seeks to develop the tax mediation application within the New Zealand setting with the objective of developing a refined tax mediation regime for New Zealand’s tax disputes resolution procedures. Although the resulting proposed New Zealand tax mediation regime will remain to be tried and tested in reality, it may nevertheless provide a pertinent foundation for the use of tax mediation both in New Zealand and in other interested jurisdictions around the world.

⁹ In the United Kingdom (UK), HM Revenue and Customs (HMRC) highlight the apparent “success” of their recent ADR pilot for small and medium enterprises (SMEs) and individuals, stating that 66 per cent of the applications accepted for the pilot were either fully or partially resolved.: HM Revenue and Customs *Alternative Dispute Resolution for SME’s and Individuals: Project Evaluation Summary* (2013b) <<http://www.hmrc.gov.uk/news/adr-public-eval-report.pdf>> at 4. HMRC also highlight the apparent positive external perceptions of the ADR pilot, reporting “a 93% positive and 4% neutral approval rating in external media coverage” on the pilot.: *ibid*, at 3. See also, n 64 below.

In addition, this research makes a contribution towards the limited extant literature on the use of tax mediation globally. Jone and Maples (2012b) observe that the limited existing body of tax mediation literature predominantly emanates from the United States. This study contributes towards addressing this void in the literature, specifically from a New Zealand perspective. This study also adds to an increasing number of taxation studies utilising a mixed methods research approach (McKerchar, 2008). Specifically, this study utilises a sequential mixed methods approach, using one research method to assist in interpreting the results of another method. In addition, in the context of research in taxation, McKerchar (2010, p 167) states that the focus group method of inquiry offers “real potential for gaining an in-depth knowledge of participants quickly, and often at less cost than conducting individual interviews.” Accordingly, this study also contributes towards the emerging use of focus groups in taxation research (McKerchar, 2008, 2010).

1.4 Structure of the Thesis

The remainder of this thesis is structured as follows. The next three chapters review the relevant literature to this study: Chapter 2 reviews selected prior literature in the area of tax disputes resolution, Chapter 3 reviews the prior literature on selected issues in mediation and Chapter 4 outlines Jone and Maples’ (2012b) proposed New Zealand tax mediation regime which this study seeks to refine. Chapter 5 outlines the mixed methods research approach utilised, consisting of the quantitative component of a survey questionnaire and the qualitative component of a focus group interview. Chapters 6 and 7 present the quantitative and qualitative research findings, respectively. The resulting refined New Zealand tax mediation regime is then discussed in Chapter 8. Finally, the conclusions, limitations of the study and areas for future research are addressed in Chapter 9.

Chapter 2

Literature Review: Tax Disputes Resolution

2.1 Introduction

This chapter provides a background to the current tax disputes resolution procedures in New Zealand and reviews the associated tax compliance literature. The terms ‘ADR’ and ‘mediation’ as used for the purposes of this study are also defined. This chapter consists of the following sections. Section 2.2 provides a background to the current New Zealand tax disputes resolution procedures and discusses some of the key developments associated with the procedures. Section 2.3 defines a ‘tax dispute’ in the New Zealand context and then outlines the existing tax disputes procedures. Section 2.4 discusses the care and management provisions and Inland Revenue’s policy on the settlement of tax disputes, and their implications on mediation. Section 2.5 reviews the tax compliance literature relevant to this study, namely in the areas of taxpayers’ perceptions of fairness and revenue authority contact. Section 2.6 then addresses some definitional aspects pertaining to ADR and mediation in the context of tax disputes resolution. Section 2.7 summarises the chapter.

2.2 Background to the Current New Zealand Tax Disputes Resolution Procedures

The current New Zealand tax disputes resolution procedures were introduced in accordance with recommendations made by the Richardson Committee in 1994. The Richardson Committee proposed the current disputes resolution procedures to change the way tax issues arising between Inland Revenue and taxpayers were managed, with a view to ensuring that tax issues were identified early, managed efficiently in terms of time and cost, and resolved promptly where possible without recourse to the Courts being needed. The disputes resolution procedures contained in Part IVA (Disputes Procedures) of the Tax Administration

Act 1994 (TAA 1994) were subsequently enacted in 1996. The procedures were subject to a post-implementation review in 2003 (IRD, 2003) and were subsequently amended in 2004, with the changes effective generally from 2005.

In August 2008 the NZLS and NZICA made a rare joint submission (NZLS/NZICA, 2008) to the Minister of Revenue which requested a review of the disputes resolution process and made significant proposals for change. NZICA/NZICA (2008, para 2.1(d)) observed that:

Effectively, taxpayers with disputes over small amounts, have no forum for their disputes to be considered because of the cost in taking those disputes through the disputes resolution procedures in the first place. It is important to realise that 89% of New Zealand businesses employ five or fewer people. The disputes resolution procedures do not cater for the majority of New Zealand businesses or individuals.¹⁰

NZLS/NZICA (2008) stated that the amendments to the procedures effective in 2005 had not cured the problems identified by the Richardson Committee. In response to these concerns, Inland Revenue implemented a number of administrative changes to the disputes resolution process effective from 1 April 2010, including the option of facilitated conferences (IRD,

¹⁰ NZLS/NZICA explain that “a large number of New Zealand businesses and individuals ... are ‘small’ in tax terms.” NZLS/NZICA regard enterprises employing five or fewer staff as “‘small’ in tax terms”: Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994* (Wellington, 2008) at Appendix A, 28. On this basis, references made to ‘small taxpayers’ in this study will include individual taxpayers and those enterprises regarded by NZLS/NZICA as “‘small’ in tax terms” (that is, employing five or fewer staff). However, note that the New Zealand Ministry of Economic Development (MED) defines enterprises employing five or fewer staff as “micro-enterprises”. The MED’s definition of SMEs (enterprises employing 19 or fewer staff) encompasses micro-enterprises. As at 31 January 2013, MED data showed that SMEs accounted for 97 per cent of all enterprises in New Zealand and micro-enterprises accounted for 90 per cent of all enterprises: Ministry of Economic Development “Small and medium sized enterprises” (2013) <<http://www.med.govt.nz/>>.

2010a).¹¹ Inland Revenue also released an issues paper, *Disputes: a Review* (IRD, 2010c), and draft Standard Practice Statements (SPSs)¹² on administrative processes associated with the disputes process for public consultation in July 2010.

However, a further joint submission issued by the NZLS and NZICA in September 2010 (NZLS/NZICA, 2010) disagreed with the position adopted in the issues paper that, for the most part, no legislative change was required. NZLS/NZICA (2010, para 2.4) stated that:

We are concerned that unless there is legislative reform ... the integrity of the tax system will continue to be undermined. The ability to progress tax disputes with a minimum of delay and cost will also be lost.

NZLS/NZICA (2010, para 2.3) further noted that:

In our experience, taxpayers are disengaging from a process that prices them out of the ability to seek justice and that delays their access to the courts. This is cementing the view of taxpayers that the system is weighted against them and that there is no point in pursuing disputes.

¹¹ The NZLS/NZICA 2008 joint submission had suggested, amongst other things, that: "Part IVA should be amended to provide that at least one conference is a statutorily required part of the disputes resolution procedure, with an independent mediator or personnel from the Litigation Management Unit or the Office of the Chief Tax Counsel, being able to attend. We believe the presence of an independent party would provide taxpayers with confidence that a resolution is possible ... and would be a useful incentive for some taxpayers to engage in the process." Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, *ibid*, at [3.14(a)]. However, "IRD declined to permit outsiders to mediate disputes conferences and instead offered taxpayers the services of facilitation by senior IRD officers who ... had had no previous involvement with the dispute." Keating M *Tax Disputes in New Zealand: A Practical Guide* (CCH New Zealand Ltd, Auckland, 2012) at 169.

¹² See Inland Revenue "Disputes resolution process commenced by the Commissioner of Inland Revenue" (ED 0126, July 2010d) <<http://www.taxpolicy.ird.govt.nz/sites/default/files/2010-sps-ed0126-disputes.pdf>> and Inland Revenue "Disputes resolution process commenced by a taxpayer" (ED 0127, July 2010e) <<http://www.taxpolicy.ird.govt.nz/sites/default/files/2010-sps-ed0127-disputes.pdf>> respectively.

Various commentators have also expressed similar concerns over the operation of the New Zealand tax disputes resolution procedures (Blanchard, 2005; Coleman 2007; Jamieson, 2007; Keating, 2008; Joanne Dunne, 2009; Young J, 2009). For example, Joanne Dunne (2009, p 4) observed that:

... it is clear that case precedent is not being provided by the Courts because ... the costs of completing elongated tax disputes procedures aggregated to the costs of litigation are too great ... These problems are affecting taxpayers' perception of the fairness of the procedures and are having a negative impact on taxpayer engagement in the tax system.

A set of finalised SPSs¹³ documenting the administrative changes made by Inland Revenue in April 2010, were issued by Inland Revenue in November 2010. The Taxation (Tax Administration and Remedial Matters) Bill 2010 (the Bill), outlining legislative amendments to the disputes resolution procedures, was later introduced into Parliament on 23 November 2010. Notwithstanding these two aforementioned occurrences, New Zealand commentators and professional organisations alike continued to raise concerns that the current disputes procedures were not meeting the objectives outlined by the Richardson Committee (Brown and Butler, 2011; KPMG, 2011; NZLS/NZICA, 2011; PwC, 2011).

A joint submission issued by the NZLS and NZICA on the tax disputes changes contained in the Bill stated that: “the Government has not seen fit to deal in this Bill with a number of very real difficulties in the tax disputes area” (NZLS/NZICA, 2011, p 1). NZLS/NZICA (2011, p 5) also noted that:

¹³ See Inland Revenue “SPS 10/04: Disputes resolution process commenced by the Commissioner of Inland Revenue” (2010g) 22(11) Tax Information Bulletin 60 [“SPS 10/04”] and Inland Revenue “SPS 10/05: Disputes resolution process commenced by a taxpayer” (2010h) 22(11) Tax Information Bulletin 93 [“SPS 10/05”] respectively.

... it is critical for confidence in the tax system that the disputes resolution procedures operate effectively and in a balanced, measured, cost efficient, and fair way and are seen to do so by New Zealanders. (emphasis in original)

In response to the submissions made on the Bill, the *Taxation (Tax Administration and Remedial Matters) Bill: Officials Report to the Finance and Expenditure Select Committee on Submissions on the Bill* (Officials Report) in April 2011 stated that:

Officials understand the concerns giving rise to these submissions – that taxpayers are being “burnt off” by an overly long and elaborate disputes process. However, officials disagree with submitters that legislation is the best way of addressing these concerns. (IRD, 2011a, p 40)

The Officials Report further justified:

Inland Revenue has very recently introduced fundamentally revised systems to administer disputes. These processes are set out in two standard practice statements [SPS 10/04 and SPS 10/05] and include improved documentation, bilateral opt out guidelines and most significantly, independently facilitated conferences. (IRD, 2011a, p 40)

IRD (2011a, p 40) anticipated that the revised administration would “result in a more efficient and satisfactory process, particularly for smaller disputes.” The Officials Report concluded that:

The Minister of Revenue has agreed that these SPSs should be given an opportunity to work and has requested that a further review take place in two years – once the revised

administrative systems have been given time to “bed in”. If significant taxpayer concerns then remain, further legislative measures can be considered at that time. (IRD, 2011a, p 40)

The Taxation (Tax Administration and Remedial Matters) Act 2011 was enacted in August 2011 and Inland Revenue subsequently released revised SPSs¹⁴ reflecting the resulting legislative changes to the disputes process. These SPSs replaced the earlier SPS 10/04 and SPS 10/05 and took effect from 13 October 2011.¹⁵ Nevertheless, the current disputes resolution procedures continue to be widely viewed by commentators and practitioners as “undoubtedly exacting, extensive and thus expensive” (Young J, 2011, p v).¹⁶ It has been suggested that “the time might well be ripe for a far-reaching review of the disputes resolution procedures” (Griffiths, 2012a, p 23). In the researcher’s view, the incorporation of a tax mediation regime within the disputes resolution procedures could possibly form part of such a ‘far-reaching review’.

¹⁴ See Inland Revenue “SPS 11/05: Disputes resolution process commenced by the Commissioner of Inland Revenue” (2011b) 23(9) Tax Information Bulletin 16 [“SPS 11/05”] and Inland Revenue “SPS 11/06: Disputes resolution process commenced by a taxpayer” (2011c) 23(9) Tax Information Bulletin 50 [“SPS 11/06”] respectively.

¹⁵ Inland Revenue also released the following guides on the tax disputes procedures in early 2012: Inland Revenue *Disputing a notice of proposed adjustment: What to do if Inland Revenue disputes your assessment* (IR 777, Wellington, January 2012a) [“IR 777”] and Inland Revenue *Disputing an assessment: What to do if you dispute an assessment* (IR 776, Wellington, April 2012c) [“IR 776”].

¹⁶ The results of the 2012 *NZICA Tax Management NZ IR Satisfaction Survey* highlighted that 69 per cent of the NZICA member respondents who did not manage to reach a mutual agreement in disputes with Inland Revenue (on behalf of their client or organisation) reported that the cost of continuing the dispute was too great and 61 per cent of the respondents reported that the time commitment of continuing the dispute was too great. See Colmar Brunton *NZICA Tax Management NZ IR Satisfaction Survey* (2012) New Zealand Institute of Chartered Accountants <<http://www.nzica.com>>. Paul Dunne states that the results of the 2012 survey “substantiate the message that NZICA has been giving for a long period of time; the disputes process is too time consuming and too costly, and results in taxpayers settling tax disputes for reasons other than the merits of their position.”: Paul Dunne in Ng L and Cunliffe C “Inland Revenue service – are you satisfied?” (February 2013) *Chartered Accountants Journal* 78 at 79.

2.3 The New Zealand Tax Disputes Resolution Procedures

This section firstly defines the term ‘tax dispute’ as applied in the context of the New Zealand tax disputes resolution procedures and secondly outlines the current tax disputes resolution procedures.

2.3.1 The Term ‘Tax Dispute’ in New Zealand

A number of differing definitions (and classifications) of the term ‘tax dispute’ are used by various overseas revenue authorities and tax commentators.¹⁷ In the New Zealand context, the Richardson Committee (1994, para 10.1) provide the following definition of a tax dispute: “A ‘tax dispute’ occurs when a taxpayer and the Commissioner do not agree on the facts and/or interpretation of tax law on which the taxpayer’s assessment has been based.” Along similar lines, Inland Revenue (2010b, p 1) state that the formal tax disputes resolution process may be used to appeal an assessment where a taxpayer “disagree[s] with an assessment or adjustment made either by [themselves] or by Inland Revenue.”

¹⁷ For example, in the UK, HMRC’s *Resolving Tax Disputes: Commentary on the Litigation and Settlement Strategy* defines a ‘dispute’ in the “context of HMRC’s work” as “including all areas of non-agreement between HMRC and a customer or their agent over a substantive tax liability, where that non-agreement has been raised through an enquiry from either side, including pre-transaction or pre-return clearances work, through a challenge made by HMRC to a customer, or through a challenge made to HMRC by a customer where HMRC has decided to take up or respond to the challenge.”: HM Revenue and Customs *Resolving Tax Disputes: Commentary on the Litigation and Settlement Strategy* (2012a) <<http://www.hmrc.gov.uk/practitioners/lss-guidance-final.pdf>> at 9. In the Australian context, Mookhey states that: “Tax disputes may arise at any stage after the ATO [Australian Taxation Office] has provided a view to a taxpayer in respect of a tax liability or entitlement and related issues, and the taxpayer takes a contrary view. Given the self-assessment regime, tax disputes principally arise from the ATO’s review and audit activities. Tax disputes with the ATO typically come within four categories: (a) complaints; (b) objections to private binding rulings given to taxpayers on tax-related issues by the ATO; (c) disputes as to facts or the application of tax law by a taxpayer as matters are being assessed by the ATO; and (d) objections to assessments of liability to tax.” Categories (b) and (d) generally refer to statutory rights, while categories (a) and (c) relate to administrative due process. See Mookhey S “Tax disputes system design” (2013) 11 *eJournal of Tax Research* 79 at 83. The ATO website outlines a list of “ATO decisions” which a taxpayer may dispute (“object to”) using the “objections process”. See Australian Taxation Office “Guide to correcting mistakes and disputing decisions: Decisions you can object to, and time limits” (2012c) <<http://www.ato.gov.au>>.

Tax barrister, Geoffrey Clews, provides a more comprehensive definition for a tax dispute in New Zealand:¹⁸

A tax dispute is any instance where Inland Revenue or a taxpayer takes issue with the other over a matter involving the application of a tax law and the consequent determination of a tax liability or an aspect of the administration of the law. The [disputes process] may have an informal phase, such as often occurs before a party issues a notice of proposed adjustment, and it may then proceed to a more formal phase through the dispute resolution stages in the Tax Administration Act. Finally, and if not earlier resolved, the [tax] dispute will include the steps each party takes to litigate the issues.¹⁹

Given that no official definition for a tax dispute exists in the New Zealand context, Clew's comprehensive definition has been adopted for the purposes of this study.

2.3.2 The Current Tax Disputes Resolution Procedures

The New Zealand tax disputes resolution procedures are prescribed in Part IVA of the TAA 1994.²⁰ The procedures apply where a taxpayer or Inland Revenue wishes to propose an adjustment to a previous tax assessment or decision, or Inland Revenue wishes to issue an assessment. This typically follows an investigation by Inland Revenue where no agreement has been reached on some or all of the issues identified. The prescribed process involves a

¹⁸ Personal correspondence with Geoffrey Clews, specialist tax barrister, Auckland, 5 March 2012.

¹⁹ Note that a tax dispute could concern a taxpayer's tax affairs over a single issue or multiple issues and relate to one or more years or to different tax types.

²⁰ The "purposes of the procedure" are set out in s 89A TAA 1994. A description of the statutory provisions and the relevant administrative steps in the current tax disputes resolution procedures are set out in Inland Revenue "SPS 11/05", above n 14 and Inland Revenue "SPS 11/06", above n 14. However, the Commissioner states that SPS 11/05 and SPS 11/06 are only intended "as a reference guide for taxpayers and Inland Revenue officers." The SPSs are not binding on Inland Revenue and only "where possible" Inland Revenue officers must follow the practices outlined in SPS 11/05 and SPS 11/06: Inland Revenue "SPS 11/05", *ibid*, at 16, [4] and Inland Revenue "SPS 11/06", *ibid*, at 50, [4].

pre-assessment phase, comprising the exchange of a number of documents by the taxpayer and Inland Revenue (Notice of Proposed Adjustment (NOPA),²¹ Notice of Response (NOR),²² Disclosure Notice,²³ Statements of Position (SOPs)²⁴) within legislatively prescribed timeframes. These documents are designed to ensure that taxpayers and Inland Revenue operate with each other on an “all cards on the table” basis and to give the parties every possible opportunity to resolve their differences before heading down the path of judicial determination (Richardson Committee, 1994, para 10.11). Included in the procedures are (some) prescribed timeframes, deemed acceptance of the other party’s position if timeframes are not met and the “issues and propositions of law exclusion rule”, which limits taxpayers and Inland Revenue to the issues and propositions of law outlined in their respective SOPs in any subsequent litigation (IRD, 2011b, para 231; IRD, 2011c, para 246).²⁵ The current procedures as outlined in the TAA 1994 do not refer to ADR processes, including mediation.²⁶

²¹ The NOPA is the first formal step in the disputes process and is issued by either the Commissioner or the taxpayer to the other party advising that an adjustment is sought to the taxpayer’s assessment, the Commissioner’s assessment or other disputable decision. Note that, the definition of “disputable decision” covers “an assessment” and any other “decision made by the Commissioner under a tax law”, except for decisions specifically excluded by the definition in s 3(1) TAA 1994.

²² A NOR is issued by the recipient of a NOPA if they disagree with the NOPA (in whole or in part).

²³ The Disclosure Notice is issued by the Commissioner and triggers the application of the “issues and propositions of law rule”, formerly the “evidence exclusion rule” (see below, n 25).

²⁴ The SOP is issued by both parties, providing an outline of the issues, facts, evidence and propositions of law with sufficient detail to support the position taken.

²⁵ Up until 28 August 2011 the “evidence exclusion rule” limited parties to the facts, evidence (excluding oral evidence), issues and propositions of law disclosed in their respective SOPs. The Taxation (Tax Administration and Remedial Matters) Act 2011, with effect from 29 August 2011, replaced the evidence exclusion rule with the “issues and propositions of law rule”. See Inland Revenue “SPS 11/05”, above n 14, at 16, [7] and Inland Revenue “SPS 11/06”, above n 14, at 50, [7]. See also s 138G TAA 1994.

²⁶ Keating and Lennard note that: “Inland Revenue have been vigilant in ensuring taxpayers dispute tax assessments only through the statutory disputes procedure. The Department will not permit taxpayers to utilise alternative forms of dispute resolution or other types of proceedings to resolve tax disputes.”; Keating M and Lennard M “Developments in tax disputes – Another step backwards?” (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, 11-12 November 2011) at 2-3. See also *Commissioner of Inland Revenue v Abattis Properties Ltd* [2002] NZCA 186, (2002) 20 NZTC 17,805.

The disputes resolution process also includes two administrative (non-legislated) procedures – the conference and adjudication phases. If a dispute has not been resolved following the exchange of the NOPA and NOR, (one or more) conference meetings may be held to narrow or resolve the facts, issues, and propositions of law in dispute. Taxpayers can also request to “opt out” of the disputes process (and proceed to court) after the conference phase if one of the following circumstances applies: the total amount of tax in dispute (that is, excluding shortfall penalties, use of money interest (UOMI) and late payment penalties if applicable) is \$75,000 or less except where the dispute is part of a wider dispute; the dispute turns on issues of fact only; the dispute concerns facts and issues that are waiting to be resolved by a court; or the dispute concerns facts and issues that are similar to those considered by the Adjudication Unit²⁷ if similar issues have been considered in a dispute in the past (IRD, 2011b, para 177; IRD, 2011c, para 208).²⁸ Before agreeing to a taxpayer’s request to opt out of the remainder of the disputes process, the Commissioner must be satisfied that the taxpayer has “participated meaningfully in discussions during the conference phase” and signed a declaration that all material information has been provided to the Commissioner (IRD, 2011b, para 174; IRD, 2011c, para 205).²⁹

²⁷ The Adjudication Unit, in Inland Revenue’s Office of the Chief Tax Counsel, is now called the Disputes Review Unit from 1 July 2013. Inland Revenue state that: “The new name reflects a slightly broader role and some additional oversight and review functions relating to the tax disputes resolution process that are performed internally.”: Inland Revenue “Change of name of the Adjudication Unit to Disputes Review Unit” (2013b) 25(6) Tax Information Bulletin 53 at 53. Note that the original name for the Adjudication Unit has been retained for the purposes of this thesis given that the name change occurred after the 31 May 2013 cut-off date for the incorporation of new developments in this thesis. In addition, at the time of the submission of this thesis, some Inland Revenue material had not yet been amended to reflect the name change.

²⁸ The release of guidelines setting out the likely circumstances in which Inland Revenue will agree with a taxpayer’s request to opt out after the conference phase was one of Inland Revenue’s administrative changes effective from 1 April 2010: see Inland Revenue “Changes to the disputes resolution process” (2010a) <<http://www.ird.govt.nz/technical-tax/general-articles/>>. These guidelines are currently found in: Inland Revenue “SPS 11/05”, above n 14, at 33-34, [177] and Inland Revenue “SPS 11/06”, above n 14, at 70, [208].

²⁹ Given that participating in the conference phase is not prescribed by legislation, it is not compulsory for either Inland Revenue or taxpayers to attend. However, Campbell and Hendriksen state that: “it is important to note that Inland Revenue will not agree to truncate a dispute unless a conference has taken place ... Therefore, taxpayers should not refuse the offer of a conference unless they are prepared to go through the full disputes process.”: Campbell N and Hendriksen M “The conference phase of tax disputes – What you need to know”

As previously noted, taxpayers are offered the opportunity to have any conference meeting(s) attended by a facilitator who is a senior Inland Revenue officer with no involvement in the dispute prior to the conference.³⁰ However, the facilitator will “have sufficient technical knowledge to understand and lead the conference meeting.”³¹ The role of the facilitator is to “promote and encourage structured discussion between Inland Revenue officers and the taxpayer on an informed basis with the *bona fide* intention of resolving the dispute” (IRD, 2011b, para 145; IRD, 2011c, para 176). The conference facilitator is not responsible for making any decision in relation to the dispute, except for determining when the conference phase has come to an end. In particular, it is not the role of the facilitator to undertake settlement of the dispute (IRD, 2011b, para 146; IRD 2011c, para 177).³²

Unofficial reports from Inland Revenue³³ suggest that around 75 per cent of conferences involve facilitation. As of 10 September 2012, Inland Revenue had concluded 164 facilitated conferences. The outcomes of these 164 conferences were as follows:

(paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, 26-27 October 2012) at [3.6].

³⁰ Having a conference facilitated is optional and a conference can be held without a facilitator. However, “conference facilitation is offered to all taxpayers as part of the disputes process.” The offer of a facilitated conference is made in writing by the Commissioner through a “conference facilitation letter”: Inland Revenue “SPS 11/05”, above n 14, at 30, [147] and Inland Revenue “SPS 11/06”, above n 14, at 67, [178].

³¹ The pool of Inland Revenue facilitators is made up of senior employees from the Assurance group (both Investigations and the Legal and Technical Services Units), the Litigation Management Unit and the Office of the Chief Tax Counsel. All facilitators complete two days of “specific training on the role as it is intended to apply in the context of the tax disputes process.”: Hendriksen M “Disputes – The new improved process? – Part 1” (paper presented to the New Zealand Law Society Tax Conference, September 2011) 1 at 10. As at 10 September 2012, 54 Inland Revenue staff members had been trained as conference facilitators. The facilitators generally each conduct two to three facilitations per year.: Personal correspondence with Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland, 10 September 2012.

³² Comparing the role of the facilitator with that of a mediator, Keating states: “This limited role [of the facilitator] is unfortunate as it appears to restrict the normally expected function of a mediator to critically test the position of each side and actively encourage compromises by both parties in attempt to obtain resolution of the dispute.”: Keating, above n 11, at 172.

³³ This information was obtained through personal correspondence with Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland, 10 September 2012.

- 68 (41 per cent) have moved to SOPs.
- 44 (27 per cent) have reached agreement through compromise.
- 33 (20 per cent) have been conceded by the taxpayer.
- 19 (12 per cent) have been conceded by the Commissioner.³⁴

Thus, 59 per cent of the cases which have proceeded to a facilitated conference have been resolved through either one party conceding or a compromise between the two parties.³⁵

Disputes that remain unresolved following the issuance of a disclosure notice and SOPs are referred to Inland Revenue's Adjudication Unit in Wellington. The Adjudication Unit's function is to consider the dispute impartially and independently of the audit function. If the adjudicator finds in favour of the taxpayer, the dispute will conclude. If the adjudicator agrees with all or any of the adjustments proposed by the Commissioner, an assessment consistent with these findings will be issued. At this point the disputes resolution process has been completed. If the taxpayer wishes to challenge the assessment they may do so by commencing court proceedings within the two-month response period under s 138B(1) TAA 1994. The dispute can be heard in the TRA or the High Court.³⁶

³⁴ It is understood that these percentages have remained relatively constant throughout the time that facilitated conferences have been offered.

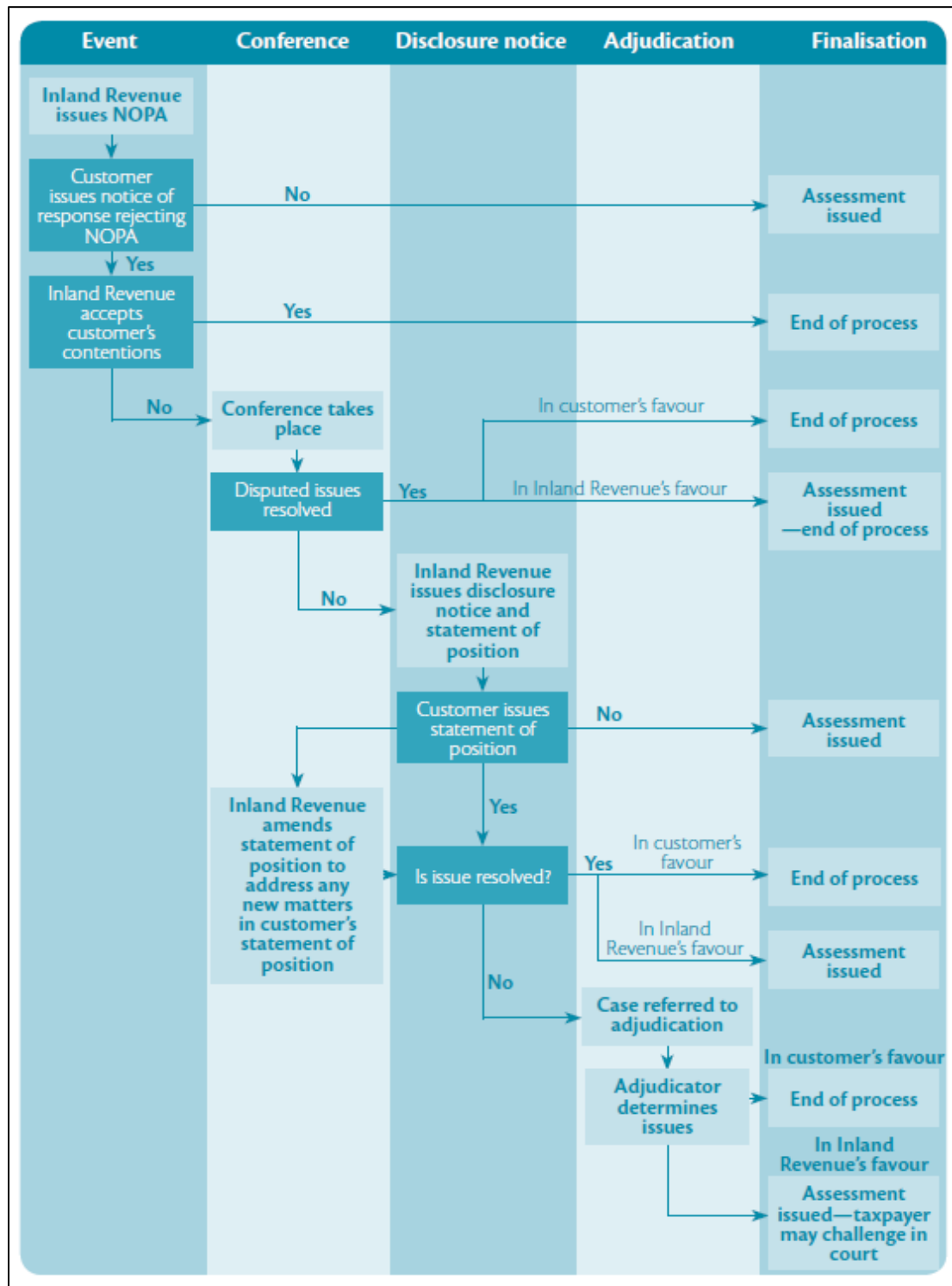
³⁵ Hendriksen notes that, "early signals are that ... the facilitated conference initiative has been taken up at a greater level than anticipated ... The feedback on those conferences has generally been positive from both taxpayers' and IR's perspective." Hendriksen, above n 31, at 14.

³⁶ Up until 28 August 2011, a taxpayer could elect in their NOPA or NOR (in a dispute initiated by the Commissioner) to have their dispute heard in the TRA acting in its small claims jurisdiction if certain criteria were met. This election effectively circumvented the remainder of the disputes process through providing an exception to completing the full process. This election was available to taxpayers if the amount of tax in dispute was \$30,000 or less, the facts were clear and not in dispute and no significant legal issues of precedent were involved. The Taxation (Tax Administration and Remedial Matters) Act 2011, with effect from 29 August 2011, repealed the small claims jurisdiction of the TRA.

The following Inland Revenue flowcharts outline the steps in the New Zealand tax disputes resolution process commenced by the Commissioner (Figure 2.1) and by a taxpayer (Figure 2.2), respectively.³⁷

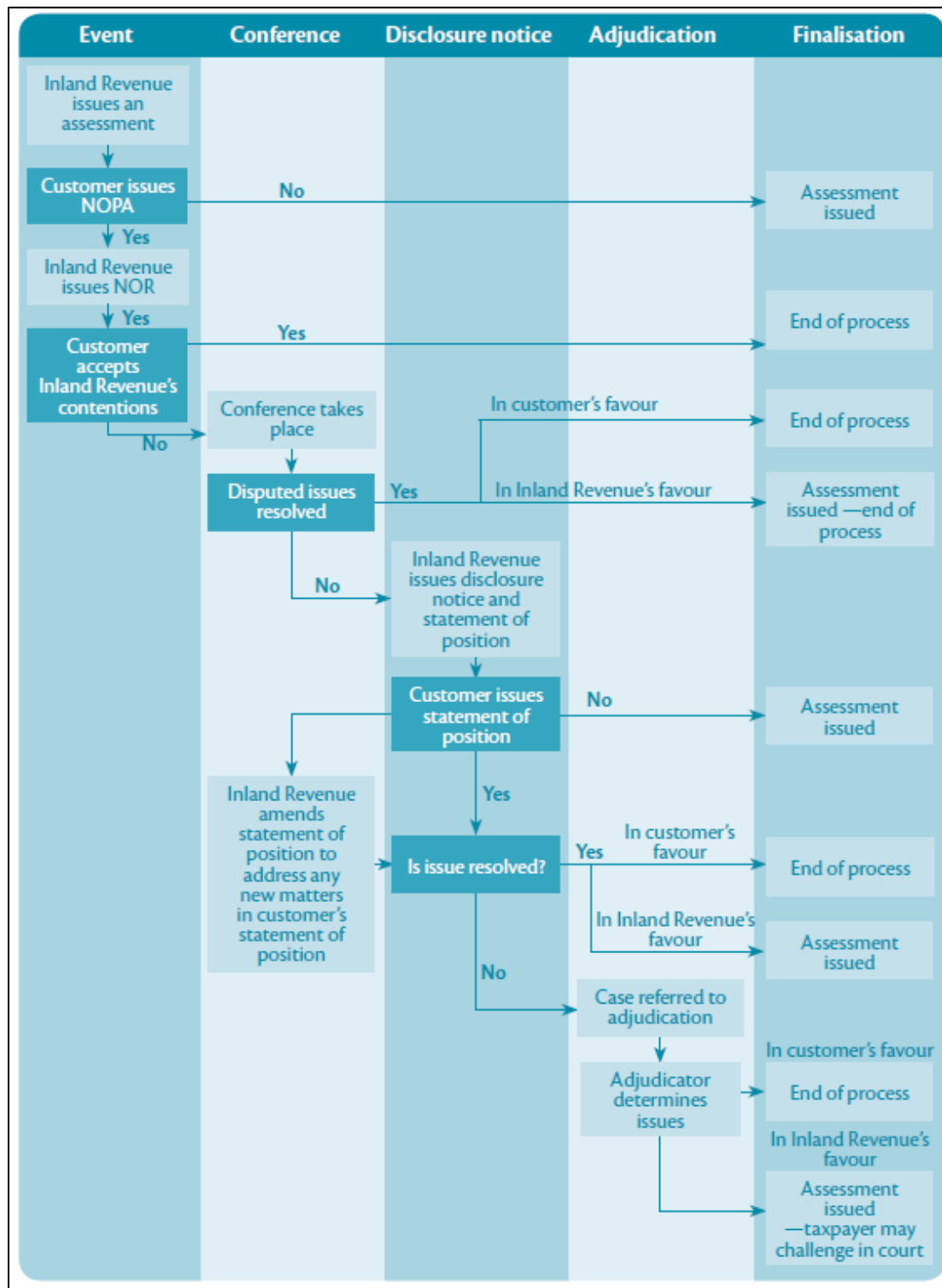
³⁷ The researcher notes that these Inland Revenue flowcharts present only a simplified outline of the New Zealand tax disputes resolution process and exclude certain features of the process including the opportunity for taxpayers to have any conference meetings attended by an Inland Revenue facilitator and the opportunity for taxpayers to request to opt out of the remainder of the disputes process after having “participating meaningfully” in the conference phase.

Figure 2.1: New Zealand Tax Disputes Resolution Process Commenced by the Commissioner of Inland Revenue



Source: IRD (2012a, p 12)

Figure 2.2: New Zealand Tax Disputes Resolution Process Commenced by a Taxpayer



Source: IRD (2012c, p 13)

2.4 The Care and Management Provisions and the Settlement of Tax Disputes in New Zealand

Tax disputes differ from other types of disputes in two respects. First, unlike most disputes one of the disputants is the state, and second and of greater significance, as tax is a statutory imposition, the tax liability of a taxpayer is not open to negotiation. Maclaren and Keating (2009, p 323) observe: “It is a fundamental constitutional principle that Parliament imposes tax while the Commissioner of Inland Revenue ... merely has responsibility for collecting tax in accordance with the statute.” In *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655, (1993) 15 NZTC 10,212 (CA) Richardson J considered that under the tax legislation at that time the Commissioner was obliged to assess and collect all taxes. Richardson J (at 10,215) held that the Commissioner did not have “a general dispensing power” and could not “opt out of the obligation to make the statutory judgment of the liability of every taxpayer under the [taxing] Act.”³⁸ However, as recognised by Inland Revenue’s Interpretation Statement 10/07 (IS 10/07), the reality is that the Commissioner must operate the tax system with limited resources and this means that “the Commissioner cannot always collect every last dollar of tax owing in every case” (IRD, 2010f, para 1).

Section 6A(2) and (3) of the TAA 1994 were enacted to, inter alia, “make clear that the Commissioner is not required to collect all taxes owing regardless of the cost and resources involved” (IRD, 2010f, para 11). Instead, the Commissioner has the duty to maximise the net revenue collected over time. Section 6A(2) provides that the Commissioner is “charged with the care and management of the taxes covered by the Inland Revenue Acts.” Section 6A(3)

³⁸ The position that the Commissioner “is under a statutory obligation to assess and collect the correct amount of tax” is reflected in Inland Revenue’s settlement policy, released in August 1998: Inland Revenue “Finalising agreements in tax investigations: Standard Practice Statement INV-350” (1998) 10(8) Tax Information Bulletin 4 at 4 [“INV-350”]. Note that, at the time of submission of this thesis INV-350 remains “under review” by Inland Revenue.

provides that the Commissioner has the duty to “collect the highest net revenue that is practicable within the law.” Section 6A(2) and (3) legislatively recognise that the Commissioner exercises managerial discretion as to the allocation and management of his resources (IRD, 2010f, para 3). In addition, s 6A(3)(b) and (c) impose obligations on the Commissioner in discharging the duty under s 6A(3), to promote voluntary compliance and minimise taxpayers’ compliance costs. However, Griffiths (2012b, p 181) notes that the effect of IS 10/07, with its focus on s 6A(3)(a) (the resource constraint factor) to the exclusion of s 6A(3)(b) and (c) (the promotion of compliance factors) “is to narrow the applicability of care and management.”

Lennard (2008a, p 29) emphasises that by enacting s 6A Parliament “intended to make a significant change in the law and confer on the Commissioner power to settle tax litigation and accept less than 100% of the tax assessed.”³⁹ The Court of Appeal in *Accent Management Ltd v Commissioner of Inland Revenue* [2007] NZCA 231, (2007) 23 NZTC 21,366 (*Accent Management*) confirmed the Commissioner’s ability to settle tax disputes on a compromise basis, “including the ability to settle with some parties to a dispute and not with others (providing the Commissioner remained equally willing to settle with taxpayers in similar situations)” (Lennard, 2008a, p 30).⁴⁰ Accordingly, Lennard (2008a, p 30) concludes that the

³⁹ Lennard states that this intention is “made clear” from: the review by the Organisational Review Committee *Organisational Review of the Inland Revenue Department* (New Zealand Government, Wellington, 1994) at s 8, which provided the basis for the enactment of s 6A; the language of s 6A itself; and the Court of Appeal decisions in *Auckland Gas Co Ltd v Commissioner of Inland Revenue* [1999] 2 NZLR 409, (1999) 19 NZTC 15,027 and *Attorney-General v Steelfort Engineering Co Ltd* [1999] NZCA 18, (1999) 1 NZCC 61,030 (*Steelfort*): Lennard M “Peace in Our Time: Part 1” *Taxation Today* 4 (Wellington, February 2008a) 29 at 29. For a discussion of the legislative history of s 6A, see also Inland Revenue “IS 10/07: Care and management of the taxes covered by the Inland Revenue Acts – section 6A(2) and (3) of the Tax Administration Act 1994” (2010f) 22(10) Tax Information Bulletin 17 [“IS 10/07”] at 20-23, [22]-[41].

⁴⁰ See also Whitiskie K “Settlement of tax disputes in litigation” (paper presented to the New Zealand Law Society Tax Conference, September 2011) 49 at 60.

Commissioner should “be willing, where appropriate, to settle tax disputes at *all* levels.”⁴¹

(emphasis added) Furthermore, the decision in *Accent Management*:

... endorse[d] a wide discretion by the Commissioner to enter into settlements on commercial terms even if the settlement does not reflect either the IRD’s view of the “correct” tax position or the relevant statutory provisions. (Keating, 2012, p 314)

In order for mediation (and ADR generally) to be successful, both parties to the dispute must have the ability and willingness to settle and indeed to compromise.⁴² As indicated in the foregoing discussion, in the context of his or her care and management responsibility the Commissioner has the ability (and arguably the obligation based on s 6A and s 6⁴³) to settle disputes at all levels. However, the Commissioner has been slow⁴⁴ – “some would say glacial” – both to take advantage of the ability to settle tax disputes and to promulgate a policy outlining when settlements might be suitable (and establish procedures for such settlements) (Lennard, 2008b, p 16).⁴⁵

⁴¹ Lennard observes that not all cases are capable of settlement and that there are a variety of factors (both generally and in the tax context) which can affect whether a tax dispute should be settled, and if so, how and on what terms: Lennard, above n 39, at 30-31.

⁴² Citing *Steelfort* at 61,036-61,037 where Blanchard J noted that: “[In] exercise of a managerial discretion, the Commissioner now has a broad power to enter into *compromises* where that course is consistent with his duty under sections 6 and 6A” (emphasis added), Griffiths states that “the word ‘compromise’ ... is suggestive of negotiation, concession or finding a middle ground.”: Griffiths S “No discretion should be unconstrained: Considering the ‘care and management’ of taxes and the settlement of tax disputes in New Zealand and the UK” (2012b) *British Tax Review* 167 at 179.

⁴³ Section 6 of the TAA 1994 requires the Commissioner, “at all times to use their best endeavours to protect the integrity of the tax system.”

⁴⁴ Griffiths notes, in respect of the care and management discretion (in s 6A): “From the start, the Commissioner was somewhat wary of this discretion. It is clear from the officials’ report to Parliament in response to the submissions on the Bill [Taxation Reform (Binding Rulings and Other Matters) Bill 1994 (67-2)] that introduced the provision that the Department considered that the new provisions would make no change to the existing situation” and did not imply “a new ability to settle disputes”: Griffiths, above n 42, at 177.

⁴⁵ Inland Revenue’s first public consideration of its power of settlement was in 1999 when it released two draft policy statements: Inland Revenue *Settlement of disputed tax litigation* (ED0007, Wellington, October 1999a), a draft standard practice statement for litigation disputes, and Inland Revenue *Finalising agreements in tax investigations* (ED0008, Wellington, October 1999b), a draft standard practice statement for other (pre-litigation) disputes. These draft policy statements were never finalised. Following a series of draft interpretation

There is some (cautious) support for settling tax disputes prior to the litigation stage in Inland Revenue publications. For example, SPS 11/05 on the disputes resolution process comments:

A NOPA is not an assessment. It is an initiating action that allows open and full communication between the parties. If possible, the taxpayer will be given the opportunity to settle a dispute by entering into an agreed adjustment⁴⁶ with Inland Revenue before the Commissioner issues a NOPA. (IRD, 2011b, para 37)

In addition, SPS 11/05 and SPS 11/06 refer to the “possibility” of parties resolving or settling disputes during the conference phase of the dispute resolution process (IRD, 2011b, para 141; IRD, 2011c, para 172). The SPSs state that at a facilitated conference meeting, the facilitator will:

... promote constructive discussion of only the contentious tax issues and where possible, encourage both parties to explore the issues, resolve or settle the dispute (subject to our internal revenue delegations and guidelines on settlement). (IRD, 2011b, para 158(g); IRD, 2011c, para 189(g))

However, Campbell and Hendriksen (2012, para 10.10) note that Inland Revenue officers “remain reluctant when participating in the conference phase to make the initial settlement

statements: Inland Revenue *Interpretation of sections 6 and 6A of the Tax Administration Act 1994: Care and management of taxes – exposure draft for external consultation* (INS0072, Wellington, December 2005) which was superseded by Inland Revenue *Care and management of the taxes covered by the Inland Revenue Acts – section 6A(2) and (3) of the Tax Administration Act 1994 – exposure draft for comment and discussion* (INS0072, Wellington, August 2008), Inland Revenue finally in October 2010, finalised its policy on the operation of s 6A in “IS 10/07: Care and management of the taxes covered by the Inland Revenue Acts – section 6A(2) and (3) of the Tax Administration Act 1994” (see Inland Revenue “IS 10/07”, above n 39). Accordingly, it took Inland Revenue more than a decade to finalise its policy on settling tax disputes.

⁴⁶ In this respect, Martin observes that this assumes “of course, that the matter can be settled. In practice, Inland Revenue may reject the possibility of offering an Agreed Adjustment and, instead, goes straight into the disputes process by issuing a NOPA.”: Martin D “Inland Revenue’s accountability to taxpayers” (2008) 14 *New Zealand Journal of Taxation Law and Policy* 9 at 23.

offer,” despite the fact that the potential for a negotiated settlement is “made explicit in the conference agenda.” Campbell and Hendriksen (2012, para 10.10) claim that it may be that those Inland Revenue officers operate under “the misapprehension that Inland Revenue is not permitted to reach negotiated settlement with taxpayers” or otherwise “do not consider settlement ‘appropriate.’”

IS 10/07 also includes some discussion on settlements and agreements.⁴⁷ Specifically, with respect to whether the Commissioner can settle tax disputes before litigation or the formal disputes process has started, IS 10/07 states:

The Commissioner considers that, in principle, there is no impediment to him doing so ... The Commissioner’s position and responsibilities before litigation or the formal disputes process has started are not inherently different to his position and responsibilities during litigation. (IRD, 2010f, para 156)

To this point in IS 10/07, Inland Revenue appears favourably disposed toward early settlement of tax disputes. Nevertheless, the Interpretation Statement contains a caveat which potentially limits pre-litigation settlement (including mediation):

However, the litigation processes often results in him possessing more information than he did before. Accordingly, the Commissioner will consider settling before litigation or the formal disputes process has started *only* if satisfied that he has sufficient information on which to make an informed decision. (IRD, 2010f, para 156) (emphasis added)

⁴⁷ Keating remarks that IS 10/07 “provides little guidance on the Commissioner’s approach to settlement, dealing only briefly with ‘settlements and agreements’ as part of the wider consideration of the Commissioner’s care and management power. (Only 10 out of the 237 paragraphs ([151]-[161]) specifically discuss ‘settlements and agreements’, while only one of the 20 examples in the appendix deals briefly with settlements.)”: Keating, above n 11, at 318.

Lennard (2008b, p 18) posits another related reason for Inland Revenue's reluctance to settle at the earlier stages of the dispute resolution process:

The justification for Inland Revenue's cautious and grudging approach to settling cases before litigation appears to revolve around a lack of certainty or precision as to the strength of the respective parties' cases before litigation has commenced. [But] choosing the litigation stage as a cut-off is arbitrary and in many cases may mean that potential settlement opportunities are delayed for months or years.

Maclaren and Keating (2009, p 348) critically observe that: "Although Inland Revenue appears to consider that it can settle cases in litigation, there is no clear reason why it rarely settles disputes that are progressing through the disputes procedure."

In contrast, the Australian Federal Commissioner of Taxation (the Australian Commissioner) recognises the ability to negotiate settlements of tax disputes in the ATO's Code of Settlement Practice.⁴⁸ The statutory authority for this discretion is contained in s 44 of the Financial Management and Accountability Act 1997 (Cth) which requires the Australian Commissioner to manage the ATO in an efficient, effective, economical and ethical manner.⁴⁹ The Code of Settlement Practice acknowledges that settlement discussions can take place at any part of a dispute including: "during an audit, usually following a taxpayer's

⁴⁸ The Code of Settlement Practice "provides guidelines on the settlement of taxation disputes in relation to all taxpayers. It provides guidance as to the situations in which settlement could be considered and outlines the processes which should be followed." The Code of Settlement Practice was issued in 1991 and revised in 1999, 2001 and 2007: Australian Taxation Office *Code of Settlement Practice* (2007a) <<http://www.ato.gov.au/>> at 1.

⁴⁹ Maclaren and Keating observe that the "Australian Courts have had no hesitation in interpreting the Australian Commissioner's administrative discretion as including the power to settle or compromise individual tax disputes. While basing that power on the discretion to manage the collection of taxes generally, the Australian Courts have always been willing to apply that discretion to particular taxpayers.": Maclaren K and Keating M "The settlement of tax disputes: the Commissioner is able but not willing" (2009) 15 New Zealand Journal of Taxation Law and Policy 323 at 334. See, for example, *Precision Pools Ltd v Federal Commissioner of Taxation* [1992] FCA 445, (1992) 37 FCR 554, 24 ATR 43 and *Grofam Pty Ltd v Federal Commissioner of Taxation* [1997] FCA 660, 36 ATR 493.

consideration of a position paper from the ATO or other ATO communication of its thinking” (ATO, 2007a, para 23). Maclaren and Keating (2009, p 349) conclude:

There appears to be no principled reason Inland Revenue should restrict its power to settle disputes only to those in litigation. Inland Revenue’s practice is at odds with the ATO’s Code of Settlement Practice, which expressly contemplates settlements at all phases of a dispute.

If mediation is to be adopted or incorporated into the New Zealand tax dispute resolution process, there must be a willingness on behalf of Inland Revenue (as well as the taxpayer) to settle (and compromise). Consistent with Maclaren and Keating’s (2009, p 351) conclusions, this will arguably require a change in the way that the Commissioner exercises his or her managerial discretion under ss 6 and 6A of the TAA 1994 (as well as establishing clear policy and procedures for entering into settlements at all stages of a dispute). However, the following limitation should also be noted: “Care and management appears to have been placed in a relatively inhospitable ... environment in New Zealand” (Griffiths, 2012b, p 183). From the start of the dispute resolution process, with the issuing of a NOPA and the reply in a NOR, disputes are placed into an adversarial structure. This is not to say that dispute resolution in New Zealand cannot possibly be amicable, but it is important to recognise that the dispute resolution procedures are designed to underpin an adversarial challenge procedure in the court (Griffiths, 2012b). They are not designed to support a “collaborative” dispute resolution model (which arguably accommodates the ability and willingness of parties to compromise) (Griffiths, 2012b, p 183). The significance of this ought not to be ignored.

2.5 Selected Tax Compliance Literature

The tax compliance literature identifies that factors associated with tax disputes resolution procedures can influence taxpayers' levels of compliance (Jackson and Milliron, 1986; Richardson and Sawyer, 2001). Jackson and Milliron's (1986) review of prior studies on tax compliance identifies 14 key variables which have the potential to affect taxpayers' compliance behaviour with tax laws.⁵⁰ Of these variables, taxpayers' perceptions of fairness and revenue authority contact are the two variables most influenced by the disputes resolution process. These variables are addressed in Sections 2.5.1 and 2.5.2, respectively.

2.5.1 Taxpayers' Perceptions of Fairness

The studies⁵¹ reviewed by Jackson and Milliron (1986) alternated between finding a significant positive relationship between fairness perceptions and taxpayer compliance, and finding no discernible effect. Jackson and Milliron (1986) noted that some of this uncertainty is likely to be the result of the multi-dimensional nature of fairness as a tax compliance variable. A later review of the tax compliance literature by Richardson and Sawyer (2001) also drew similar conclusions.

Notwithstanding the above mixed findings, Saad (2011) cites a number of previous studies which document the importance of tax fairness in influencing compliance decisions.⁵²

⁵⁰ The 14 variables are: age, sex, education, income level, withheld income source, occupation, compliant peers, ethics, fairness, complexity, IRS contact, sanctions, probability of detection and tax rates: Jackson BR and Milliron VC "Tax compliance research, findings, problems and prospects" (1986) 5 *Journal of Accounting Literature* 125 at 126.

⁵¹ Only a limited number of studies on tax fairness have been undertaken in the context of the New Zealand tax system. For examples, see: Hasseldine DJ, Kaplan SE and Fuller LR "Characteristics of New Zealand tax evaders: A note" (1994) 34 *Accounting and Finance* 79; and Tan LM "Taxpayers' perceptions of fairness of the tax system: A preliminary study" (1998) 4 *New Zealand Journal of Taxation Law and Policy* 59. However, both of these studies were carried out before the introduction (formally in 1998) of the current self-assessment system which relies heavily on voluntary taxpayer compliance.

⁵² For examples, see: Richardson G "The impact of tax fairness dimensions on tax compliance behavior in an Asian jurisdiction: The case of Hong Kong" (2006) 32 *International Tax Journal* 29; Gilligan G and Richardson

However, Saad (2011, p 33) claims that “most of these studies only deal with either the overall fairness or the fairness of the tax rate structure, rather than the various dimensions of fairness perceptions.”⁵³ Saad (2010) posits that fairness perceptions can take various forms and identifies approximately ten dimensions of fairness from prior literature, including procedural fairness (or procedural justice).⁵⁴ Procedural justice concerns the perceived fairness of the procedures involved in decision-making and the perceived treatment one receives from the decision maker (Murphy, 2005). Murphy (2005) suggests that people who feel that they have been treated in a procedurally fair manner by an organisation will be more likely to trust that organisation and will be more inclined to accept its decisions and follow its directions. The procedural justice literature also indicates that people who feel they have been fairly treated by an authority regard the status of the authority as more legitimate regardless of the direction of the decision outcome (Tyler, 1997; Magner, Sobery and Welker, 1998).

In the context of taxation, an extensive body of research supports the interpretation that people who feel treated fairly by authorities tend to attribute greater legitimacy and trustworthiness to them; and perceiving authorities as legitimate and trustworthy, they are more willing to comply voluntarily (Tyler and Lind, 1992; Tyler and Huo, 2002; Wenzel, 2006). Van Dijke and Verboon (2010) extend this interpretation and argue that particularly

G “Perceptions of tax fairness and tax compliance in Australia and Hong Kong – a preliminary study” (2005) 12 *Journal of Financial Crime* 331; Hite PA and Roberts ML “An experimental investigation of taxpayer judgments on rate structure in the individual income tax system” (1991) 13(2) *Journal of the American Taxation Association* 115; McGhee TM, White RA and Cohn E “The effect of corporate tax allocations on horizontal equity analysis for individual income taxpayers” (1996) 8 *Advances in Taxation* 101; Porcano TM and Price CE “Some evidence on the association between judgment criteria and fairness perceptions” (1992) 4 *Advances in Taxation* 183; Song Y and Yarbrough TE “Tax ethics and taxpayer attitudes: A survey” (1978) 38 *Public Administration Review* 442.

⁵³ With the exception of Gilligan and Richardson, *ibid*.

⁵⁴ Other dimensions of fairness identified include: vertical fairness; horizontal fairness; policy fairness; exchange fairness; a preference for either progressive or proportional taxation; personal fairness; tax rate fairness; special provisions; and general fairness: Saad N “Fairness perceptions and compliance behaviour: The case of salaried taxpayers in Malaysia after implementation of the self-assessment system” (2010) 8 *eJournal of Tax Research* 32 at 35.

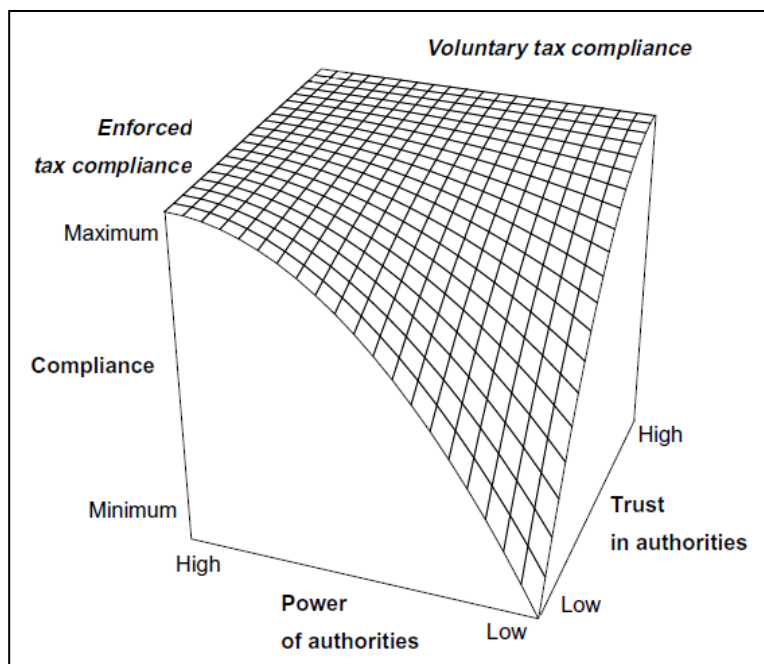
citizens with low trust in authorities will observe closely whether the tax office acts in a procedurally fair manner in order to assess whether the tax office will abuse their power. Van Dijke and Verboon (2010) suggest that this should make especially low trust citizens susceptible to information regarding how fairly the tax office enacts decision making procedures in their decision whether to voluntarily comply or not. Conversely, people with high trust in authorities, who are less likely to fear exploitation and power abuse from them, should be less susceptible to the fairness with which the tax office enacts decision making procedures.

Kirchler (2007) and Kirchler, Hoelzl and Wahl (2008) present the “slippery slope” framework for tax compliance in which both the power of tax authorities and trust in the tax authorities are relevant dimensions for understanding enforced and voluntary tax compliance (see Figure 2.3). The framework assumes that “tax compliance can be [enhanced] through increasing levels of power and trust; however, the resulting compliance is enforced in the former case and voluntary in the latter case” (Kirchler *et al.*, 2008, p 212). Of particular relevance to this study are cases of high trust and resulting voluntary tax compliance, in which the slippery slope model assumes that “committed taxpayers feel a moral obligation to contribute to the community and pay their tax share with good will” and that “this commitment is higher if taxpayers trust their authorities—in particular, when the power of authorities is perceived as legitimate” (Wahl, Kastlunger and Kirchler, 2010, p 388).⁵⁵ A further study by Muehlbacher, Kirchler and Schwarzenberger (2011) confirms that while trust induces voluntary compliance, enforced compliance is negatively related to trust. Muehlbacher *et al.* (2011, p 91) state that “[r]igid controls and punishment enforce taxpayers

⁵⁵ “Legitimate power refers to the power of an accepted authority, to which individuals pay voluntary deference. Coercive power of authorities is described as an attempt to direct individuals against their volition and can hence be perceived as enforcing a certain behavior”: Kirchler E, Hoelzl E and Wahl I “Enforced versus voluntary tax compliance: The ‘slippery slope’ framework.” (2008) 29 *Journal of Economic Psychology* 210 at 213.

to comply, but may also yield negative attitudes towards taxes.” It follows that, fairness perceptions are connected to the trust dimension of the slippery slope framework as procedural fairness or “a just treatment of taxpayers” helps to build and maintain trust and thereby increases voluntary taxpayer compliance (Kirchler *et al.*, 2008 p 219).

Figure 2.3: The “Slippery Slope” Framework



Source: Kirchler *et al.* (2008, p 212)

Procedural justice in the context of the New Zealand tax disputes process is of importance given that commentators have previously noted that “the disputes procedures in their current form are not leading to positive engagement by taxpayers in the tax system” (Joanne Dunne, 2009, p 1).⁵⁶ Keating and Lennard (2011, p 3) state that “the tax disputes procedure is vital to

⁵⁶ Keating notes that: “Whereas the number of substantive tax cases decided by the courts has dropped since the introduction of the disputes regime in 1996, over the same period the number of procedural disputes has grown exponentially. Increasingly, litigation revolves around not whether a tax position is correct but how the procedure for resolving that dispute should be applied.”: Keating M, above n 11, at 19. A review of the number and type of reported tax cases from 2005 to 2008 conducted by Keating showed there was a total of 121 reported tax cases on procedural issues in the High Court, Court of Appeal and Supreme Court, while over the same period there were only 27 purely substantive cases decided. In that time, the TRA determined 23 procedural cases compared with 29 substantive cases.: *ibid.*

the health of the New Zealand tax regime.” It provides the only method for resolving disagreements over the tax liability of citizens and as such, the procedure must not only be accessible for all taxpayers but must manifestly be seen as fair and reasonable (Keating and Lennard, 2011). Yet, as noted in Section 2.2, the two main professional bodies involved in the New Zealand tax disputes resolution procedures, NZLS and NZICA, have been “concerned for some time that the procedures do not operate as was intended [by the Richardson Committee]” and moreover, taxpayers are being “burnt off” by an overly long and elaborate disputes process (NZLS/NZICA, 2011, p 5).

2.5.2 Revenue Authority Contact

As with the compliance variable of taxpayer fairness perceptions, both Jackson and Milliron’s (1986) and Richardson and Sawyer’s (2001) reviews of prior research on tax compliance found the effect of revenue authority contact on taxpayer compliance to be inconclusive. However, of relevance to this research, studies by both Kinsey (1992) and Worsham (1996) found that taxpayers who heard of other people’s unfavourable contact with the revenue authority were significantly more non-compliant in the future. This appears to be consistent with the views expressed by the Richardson Committee (1994, para 10.3) that “many taxpayers, once aware of both the costs and delays of objections ... decide to drop the dispute” and that this “may lead to disgruntled taxpayers who undoubtedly tell other people and who may not be willing compliers in the future.”

“A ‘tax administration’ exists to ensure compliance with the tax laws” (Alm and Martinez-Vazquez, 2003, p 154). The literature identifies a number of alternative paradigms of tax administration that have different implications for tax compliance behaviour (Alm and Martinez-Vazquez, 2003; Alm, Cherry, Jones and McKee, 2010). In the traditional

“enforcement” paradigm used to analyse tax compliance behaviour, taxpayers are viewed and treated as potential criminals, and the emphasis is on repression of illegal behaviour through frequent audits and stiff penalties (Allingham and Sandmo, 1972; Yitzhaki, 1974). However, more recent research suggests that this enforcement paradigm is incomplete and posits an expanded “service” paradigm which recognises the role of enforcement, but also emphasises the role of the tax administration as a facilitator and a provider of services to taxpayer-citizens (Alm and Martinez-Vazquez, 2003; Alm *et al.*, 2010).

Alm and Torgler (2011, p 647) state that “if the goal of improved compliance is acknowledged, then strategies to improve compliance are needed.” Against this background, the service paradigm of tax administration suggests that there is scope for improvement in the services of the tax administration by becoming more “consumer-friendly” with the basic thrust of treating the taxpayer “more as a client than as a potential criminal” (Alm and Torgler, 2011, p 647). The service paradigm for tax administration “fits squarely with the perspective that emphasizes the role of government-provided services as considerations in tax compliance” and it is also consistent with the view that “the government has an incentive to justify its actions and to convince taxpayers to pay taxes” (Alm and Torgler, 2011, p 646). Alm *et al.* (2010) report that many recent tax administration reforms around the world have embraced the new service paradigm, generally with significantly positive effects on citizen perception of the tax administration.⁵⁷ The increasing use of ADR processes, including

⁵⁷ See, for example, the tax administration reforms in Norway and the United States in Aberbach JD and Christensen T “The challenges of modernizing tax administration: Putting customers first in coercive public organizations” (2007) 22 Public Policy and Administration 155. See also the strategies pursued by the ATO, as analysed in various papers in Braithwaite V (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing Ltd, Aldershot, 2003b).

mediation, by global tax administrations is consistent with this body of literature (Ernst & Young, 2010; Inspector-General of Taxation (IGT), 2011a).⁵⁸

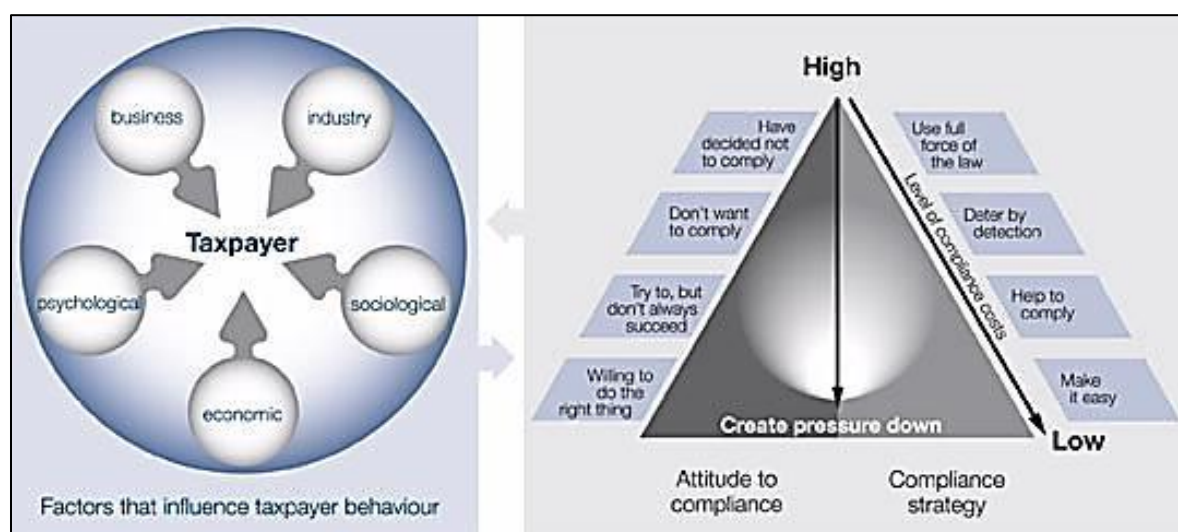
Braithwaite (2003a), developer of the ATO's Compliance Model, argues for a responsive regulation approach to tax compliance and refers to the concept of "motivational postures." Braithwaite (2003a, p 35) states that "motivational postures are said to account for the self-positioning of taxpayers in relation to their relevant authority." Motivational postures are attitudinal in nature and based on evaluations about the performance and the attribution of the relevant authority (Braithwaite, 2003a). Braithwaite (2003a) and Braithwaite, Murphy and Reinhart (2007) distinguish between five postures, ranging from rather compliance-oriented (that is, commitment and capitulation) to rather non-compliance-oriented stances (that is, resistance, disengagement and game-playing). It is possible for different motivational postures to be held simultaneously and they can change over time (Braithwaite, 2003a; Hofmann, Hoelzl and Kirchler, 2008; Hodson, 2011). "Depending on the relationship between taxpayers and tax authorities and governments and changing social norms, taxpayers change their motivational postures" (Hofmann *et al.*, 2008, p 213).⁵⁹ Braithwaite (2003a, p 35) argues that enforcement actions should be tailored to reflect different taxpayer motivations and moreover, non-compliant actions on the part of taxpayers must be met by "a responsiveness from the tax authority that recognises and deals with the wrongful act, but at the same time works to bring the more cooperative motivational postures to the fore."

⁵⁸ For example, Fortaine states that the introduction of ADR methods by the Internal Revenue Service (IRS) "was motivated by the IRS's desire to be more taxpayer friendly and to resolve disputes more quickly. Alternative dispute resolution (ADR) also aligns with the IRS's mission to '[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all'": Fontaine L "Overview of IRS pre-Appeals alternative dispute resolution methods" (2012) 43 The Tax Adviser 229 at 229.

⁵⁹ For example, Braithwaite states: "There is evidence that those that are persistently resistant can go towards being disengaged or game players. They don't start out being disengaged or game players, but a grievance such as 'they've got a vendetta against me' may facilitate the change in posture.": Valerie Braithwaite (2008) in Hodson A "Track A to E alphabet soup: John Russell's still cooking!" (2011) 6(1) Journal of the Australasian Tax Teachers Association 68 at 92.

Translating the responsive regulatory approach into practice, the ATO's Compliance Model identifies a number of factors that influence taxpayer decisions and behaviour (see the left-hand side of Figure 2.4), and outlines the different taxpayer attitudes to compliance and the corresponding compliance strategy of the ATO that best responds to each particular attitude (see the right-hand side of Figure 2.4). The Compliance Model suggests that the ATO "has the ability to influence taxpayer compliance behaviour through [its] response and interaction [with the taxpayer]" (ATO, 2009, p 1). The ultimate aim of the ATO is to increase long-term voluntary compliance through "influencing as many taxpayers as possible to move down the pyramid into the 'willing to do the right thing' zone" (ATO, 2012b, p 1).⁶⁰

Figure 2.4: The Australian Taxation Office's Compliance Model



Source: ATO (2012b, p 1)

⁶⁰ A recent ATO publication on litigation trends, *Your Case Matters 2012: Tax and Superannuation Litigation Trends* states that the ATO's current move towards the use of ADR processes contributes towards its aim of enhancing voluntary compliance: "The ATO has adopted alternative dispute resolution (ADR) as part of [it's] implementation of wider government reforms ... It [ADR] assists in decreasing legal costs by resolving disputes as close as possible to the original decision where appropriate. It is also helping us to build and enhance relationships and encouraging ongoing compliance from taxpayers.": Australian Taxation Office *Your Case Matters 2012: Tax and Superannuation Litigation Trends* (Canberra, 2012d) at 10.

Likewise, the compliance approach of Inland Revenue is guided by Inland Revenue's Compliance Model (which is based on the ATO's Compliance Model).⁶¹ Inland Revenue's Compliance Model is also designed to facilitate compliance amongst the majority of taxpayers who do, or who aim to, comply with the law by "making compliance easy" for taxpayers who are "willing to do the right thing" (IRD, 2012d, p 3).⁶² Taxpayers' compliance is affected by their perceptions of tax disputes resolution (Richardson Committee, 1994). The tax system needs a sound disputes process which allows taxpayers and Inland Revenue to resolve differences in interpretation of fact and law (KPMG, 2011). KPMG (2011, p 1) state that "if Inland Revenue's interpretations are considered to be aggressive or incorrect and those positions are unable to be tested, taxpayers will lose faith in the system." From this it follows that a well-functioning tax disputes resolution system (potentially incorporating ADR processes) is in line with the approach behind the Compliance Model and creating an environment that promotes voluntary compliance.

2.6 Alternative Dispute Resolution and Mediation Definitions in the Context of Tax Disputes Resolution

In reaction to the high cost and delays associated with conventional litigation, there has been a conscious development of alternatives to litigation (including ADR processes) over the last 20 years in societies around the world (Ministry of Justice (MOJ), 2004; Legislation

⁶¹ The ATO's Compliance Model has also been "exported to and adapted by other tax jurisdictions" including: the UK, Timor Leste, Indonesia, and within the United States, Pennsylvania: Braithwaite V "Responsive regulation and taxation: Introduction" (2007) 29 Law & Policy 3 at 4. The current Inland Revenue Compliance Model essentially replicates the ATO's Compliance Model with the exception of minor wording differences. Namely, Inland Revenue's Compliance Model uses the phrase "Assist to comply" instead of "Help to comply": Inland Revenue "IR 504", above n 8, at 3.

⁶² For a further discussion on Inland Revenue's Compliance Model, see Morris T and Lonsdale M "Translating the Compliance Model into practical reality" (paper presented to the 2004 Internal Revenue Service Research Conference, Washington DC, 2-3 June 2004).

Advisory Committee (LAC), 2007).⁶³ In the field of tax disputes resolution, the use of ADR processes is regarded as a relatively recent “phenomenon” (Ernst & Young, 2010, p 22). Ernst & Young (2010, p 6) observe that “[a]lthough the ADR concept is still evolving worldwide, the past few years have seen a significant increase in the number of ADR processes around the world.”⁶⁴

‘ADR’ is a very inconsistently used term and “different terminology has evolved in different sectors and social groups”⁶⁵ (National Alternative Dispute Resolution Advisory Council

⁶³ The New Zealand LAC is serviced by the MOJ and was established in 1986 to “provide advice to the Government on good legislative practice, legislative law proposals and public law issues”, including, inter alia, providing advice on the use of ADR clauses in New Zealand legislation. See Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* (2007) <<http://www.justice.govt.nz/lac/>> ch 18.

⁶⁴ For example, in February 2013, following a two-year ADR pilot (implemented in two stages), HMRC announced its decision to move ADR for SMEs and individuals into “business as usual from [the tax year] 2013-14.” The ADR process for SMEs and individuals “uses independent HMRC facilitators to resolve disputes between HMRC and customers during a compliance check, either before or after a decision or assessment has been made.” The facilitators are HMRC members of staff who have been trained in ADR techniques and have not been involved in the dispute. The ADR process covers both VAT and direct taxes. See HM Revenue and Customs “Alternative dispute resolution for small and medium enterprises and individuals” (media release, 4 February 2013a) <<http://www.hmrc.gov.uk/news/alternative-dispute.htm>>. For a summary evaluation report highlighting the findings of HMRC’s two-year ADR pilot, see HM Revenue and Customs *Alternative Dispute Resolution for SME’s and Individuals: Project Evaluation Summary* (2013b) <<http://www.hmrc.gov.uk/news/adr-public-eval-report.pdf>>. HMRC also ran a separate smaller scale pilot for large businesses or taxpayers with complex tax affairs which included the option for the involvement of a “third-party accredited mediator.” HMRC subsequently released draft guidance for HMRC staff to reflect the interim findings of the large and complex case ADR pilot and a finalised version of this guidance was released in April 2012. See HM Revenue and Customs *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the use of Alternative Dispute Resolution in Large or Complex Cases* (2012b) <<http://www.hmrc.gov.uk/practitioners/adr-guidance-final.pdf>>. Also, in Australia, following recommendations made by the IGT in his *Review into the Australian Taxation Office’s use of early and Alternative Dispute Resolution: A report to the Assistant Treasurer* (Sydney, 2012), the ATO is conducting an ADR pilot using in-house facilitation to resolve smaller and less complex indirect tax objections such as substantiation and penalties. The pilot is being run over two stages between November 2012 and April 2013. Participation in the pilot is by invitation only. Stage 1 commenced in November 2012 and is limited to approximately 10 indirect tax objection cases dealing with goods and services tax (GST), excise, fuel tax credits, luxury car tax and wine equalisation tax issues only. Stage 2 commenced in January 2013 and is limited to approximately 50 indirect tax objection cases. The ATO’s ADR process is an informal process designed to assist taxpayers and the ATO to resolve tax issues with the assistance of an in-house facilitator who has not been involved in the dispute and who is impartial and independent.: Australian Taxation Office “ADR facilitation pilot – overview” (2012a) <<http://www.ato.gov.au/>> at 1. At the time of the submission of this thesis, an evaluation of the ATO facilitation pilot was yet to be released.

⁶⁵ Note that ADR is commonly used as an abbreviation for ‘alternative dispute resolution’, but can also be used to mean ‘assisted’ or ‘appropriate’ dispute resolution: National Alternative Dispute Resolution Advisory Council *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (Barton, 2003) <<http://www.nadrac.gov.au/publications>> at 4. In this present study, ADR is used as an abbreviation for alternative dispute resolution.

(NADRAC), 2003, p 1).⁶⁶ In the context of tax disputes resolution, both the ATO and the IGT distinguish between early dispute resolution (EDR) and ADR. The IGT (2011b, para 1.8) states that “ADR generally refers to dispute resolution techniques employed close to, or during, the litigation process whereas EDR refers to processes which are employed prior to litigation being contemplated.” However, EDR and ADR are not mutually exclusive and may often overlap (IGT, 2011b). The Law Society of New South Wales (2011, p 2) believe that “the activities described in the ATO’s definition of **EDR** (early intervention, conferences prior to litigation, processes employed prior to litigation, etc) can legitimately be encompassed by the term ADR.” (emphasis in original) Similarly, NADRAC (2003, p 4) describes ADR as “an umbrella term for processes other than judicial determination” essentially incorporating both EDR and ADR processes. On this basis, the broader view of ADR taken by NADRAC has been adopted for the purposes of this study.

NADRAC (2003, p 4) formally defines ADR as: “those processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them.” ADR processes include arbitration, conciliation, mediation, negotiation, conferencing, adjudication, case appraisal and neutral evaluation (NADRAC, 2003).

In New Zealand, the LAC (2007, p 1) defines the term ‘ADR’ as “a collective description for any form of dispute resolution, other than methods for pursuing relief through a court or tribunal or under the Arbitration Act 1996 or its predecessor.” Stakeholders in New Zealand most readily identify ADR with the mediation and arbitration processes (MOJ, 2004).

⁶⁶ NADRAC is an independent non-statutory body, established in 1995, charged with providing policy advice to the Australian Attorney-General on the development of ADR in Australia: National Alternative Dispute Resolution Advisory Council *Report to the Commonwealth Attorney-General: A Framework for ADR Standards* (Barton, 2001) <<http://www.nadrac.gov.au/publications>> at [1.1].

However, the MOJ (2004) indicates that there has been a movement away from arbitration as an ADR mechanism and a move towards the use of mediation techniques.⁶⁷ Following Jone and Maples' (2012b) study and also in line with the suggestions made by various New Zealand commentators in the area of tax disputes resolution, this current study focuses specifically on the mediation form of ADR.⁶⁸

NADRAC (2003, p 9) formally describes mediation as:

... a process in which the participants to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

As with the term 'ADR', the term 'mediation' is also currently used in a variety of ways, "including to describe advisory processes where there may be little input by the parties" (NADRAC, 2009a, para 2.18). NADRAC (2009a, para 2.20) note that ss 2(3)-(4) of the Australian National Mediator Accreditation Standards: Approval Standards⁶⁹ explain that

⁶⁷ This in part reflects views expressed by stakeholders that the processes of arbitration are often seen as embracing the adversarial nature of court adjudication without the safeguards of the court in relation to appeal and precedent: Ministry of Justice *Alternative Dispute Resolution: General Civil Cases* (prepared for the Ministry of Justice by K Saville-Smith and R Fraser, Centre for Research Evaluation and Social Assessment, Wellington, 2004) <<http://www.justice.govt.nz/publications/global-publications>> at 16.

⁶⁸ In October 2010, Ernst & Young conducted a survey on the use of ADR processes in the tax disputes resolution systems in over 20 country jurisdictions. They identified the following countries as specifically utilising the mediation form of ADR in their tax disputes resolution systems: Australia, Belgium, Canada, South Africa, the Netherlands, UK and the United States. See Ernst & Young *Tax Dispute Resolution: A New Chapter Emerges* (2010) <<http://www.ey.com>>.

⁶⁹ The Australian National Mediator Accreditation Standards: Approval Standards apply to "any person who voluntarily seeks to be accredited under the National Mediator Accreditation System ... to act as a mediator". The National Mediator Accreditation System which commenced operation on 1 January 2008, is the overarching national accreditation scheme which defines the minimum level of standards of training and assessment for all

“mediation processes are primarily facilitative processes” and “‘blended processes’, i.e., processes that blend mediation with an ‘advisory’ component like expert information or advice, are more properly defined as ‘conciliation’, ‘advisory mediation’ or ‘evaluative mediation.’” Along similar lines, NADRAC (2003, p 3) also distinguish between conciliation and mediation and consider that:

The term ‘mediation’ should be used where the practitioner has no advisory role on the content of the dispute and the term ‘conciliation’ where the practitioner does have such a role.

Boulle, Goldblatt and Green (2008) suggest that to help deal with definitional problems and the diversity of mediation practices, it is useful to distinguish between four models of mediation that are not mutually exclusive and have different objectives:

- in settlement mediation, the objective is to encourage incremental bargaining towards compromise;
- in facilitative mediation, the objective is to negotiate in terms of the underlying needs and interests of the parties, rather than their legal rights or obligations (also discussed in Chapter 3, Section 3.3);
- in transformative or therapeutic mediation, the objective is to improve relationships, dealing with underlying behavioural causes; and
- in evaluative mediation, the objective is to reach a settlement based on the parties’ legal rights and entitlements within the anticipated range of court or tribunal outcomes (also discussed in Chapter 3, Section 3.3).

mediators in Australia: Mediator Standards Board *National Mediator Accreditation Standards: Approval Standards* (2012) <<http://www.msb.org.au>> at s 1(1).

Boulle *et al.* (2008, p 35) state that these models of mediation are “not distinct alternatives to one another” and a mediation may commence in one mode and then adopt characteristics of another. For example, it may become evaluative after a facilitative opening.⁷⁰

In the context of tax disputes, the ATO’s description of mediation essentially replicates the NADRAC definition of mediation.⁷¹ The ATO’s Practice Statement Law Administration 2007/23 (PS LA 2007/23)⁷² states that:

In facilitative processes an ADR practitioner assists the parties to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole of the dispute. Mediation is an example of facilitative dispute resolution. (ATO, 2007b, para 22)

Consistent with the ATO’s approach, this study also adopts the (facilitative-based) NADRAC definition for mediation. However, the researcher acknowledges both the existence and the potential applicability of the other “main form” of mediation, (that is, evaluative), in this study (see Chapter 3, Sections 3.3 and 3.4 below) (Alexander, 2006, p 42).

⁷⁰ HMRC’s *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the use of Alternative Dispute Resolution in Large or Complex Cases* also notes the possibility of using a mediation approach “in which facilitative mediation is attempted first, with evaluative mediation following if the initial approach is not successful.”: HM Revenue and Customs *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the use of Alternative Dispute Resolution in Large or Complex Cases* (2012b) <<http://www.hmrc.gov.uk/practitioners/adr-guidance-final.pdf>> at 5.

⁷¹ The NADRAC definition for mediation is also “widely accepted” by other professional organisations in the mediation industry in Australasia including: Leading Edge Association of Dispute Resolvers (LEADR), the Institute of Arbitrators and Mediators Australia (IAMA) and the Australian Commercial Disputes Centre Limited (ACDC). See Spencer D and Brogan M *Mediation Law and Practice* (Cambridge University Press, New York, 2006) at 33-37.

⁷² PS LA 2007/23 is issued under the authority of the Australian Commissioner and provides instructions to ATO staff on the policies and guidelines that must be followed when attempting to resolve or limit tax disputes by means of ADR. See Australian Taxation Office “Practice Statement Law Administration 2007/23” (2007b) <<http://www.ato.gov.au/>>.

In the New Zealand context, over 50 Acts of Parliament now stipulate that parties must attempt to have their disputes resolved by mediation (Becker, 2012). However, no standardised or consistent official definitions of mediation exist in statutes, rules of court, or mediation codes (Baylis, 1999; Boulle *et al.*, 2008; Becker 2012).⁷³ Despite this, the MOJ (2004, p 25) identifies five major outcomes from mediation in general, suggested by the international literature on ADR:

- increased settlement;
- improved satisfaction with the outcome or manner in which the dispute is resolved among disputants;
- reduced time in dispute;
- reduced costs in relation to the dispute resolution; and
- increased compliance with agreed solutions.

These outcomes are consistent with one of the primary objectives of the tax disputes resolution procedures laid out by the Richardson Committee (1994, Appendix E, para 5), to “resolve those disputes that do occur fairly and expeditiously, and in accordance with the law.” Keating (2008, p 437) also asserts that the benefits of mediation appear to align with “what must surely be the aim of all disputes regimes ... delivering speedy, informal and practical justice to the parties.” Moreover, Keating (2008, p 437) suggests that the mediation systems of dispute resolution “similar to those used in the employment and family law jurisdictions” could be applied to tax disputes.

⁷³ The two professional organisations for mediators in New Zealand, the Arbitrators’ and Mediators’ Institute of New Zealand (AMINZ) and LEADR, do not prescribe the model of mediation which their mediation panel members must adopt. Although, Dunlop states that: “It would be fair to say however, that both LEADR and AMINZ espouse a facilitative model of mediation.”: Dunlop N “Breaking new ground: Observations on the family mediation pilot” (2006) 5 New Zealand Family Law Journal 113 at 117.

2.7 Summary

This chapter reviews the background to the current tax disputes resolution procedures in New Zealand as well as the associated tax compliance literature. The review of literature indicates that taxpayers' perceptions of fairness of the tax disputes resolution procedures can impact on voluntary compliance. If taxpayers lose faith in the fairness and integrity of the tax disputes resolution procedures, the operation of the tax system as a whole is called into question. This is of particular importance given the self-assessment nature of the New Zealand tax system. Against the background of the various concerns raised by commentators and professional bodies with respect to the operation of the current New Zealand tax disputes resolution procedures, it has been suggested that alternative forms of dispute resolution, such as mediation, could be applied to tax disputes. Accordingly, the next chapter reviews selected literature in the area of mediation.

Chapter 3

Literature Review: Selected Issues in Mediation

3.1 Introduction

This chapter provides an overview of selected issues in the mediation field that may be of pertinence to this study. Section 3.2 distinguishes between interest-based and rights-based disputes and Section 3.3 considers the facilitative and evaluative models of mediation. Section 3.4 discusses selected aspects pertaining to mediation in commercial disputes and tax disputes. Section 3.5 then considers the issue of the apparent disjunction between mediation rhetoric and reality, discussing various practical issues in the mediation field that have been raised by mediation commentators. As these issues are not necessarily explicitly identified in the mediation literature, this area of discussion is largely informed by current dialogue and anecdotal evidence. As previously noted, it is not the purpose of this study to solve the various issues existing in the mediation field and it is also beyond the scope of this study to conduct an in-depth evaluation of the relative merits of the different approaches and models of mediation. The current use of mediation by overseas revenue authorities indicates the acceptance and applicability of mediation in tax disputes resolution. Furthermore, the IGT (2012, p 8) notes that recent mediation initiatives by revenue authorities “generally accord with international efforts to embed a culture of dispute resolution rather than litigation in the public service.”⁷⁴ Section 3.6 provides a summary of this chapter.

⁷⁴ For example, in the context of New Zealand, as noted by Keating, the “successful and efficient” mediation regimes applied to employment and family disputes in the Employment and Family Courts. Both of these regimes “mandate compulsory mediation of all disputes before a judicial officer, before unresolved disputes are referred for judicial determination.”: Keating M “Comment: New Zealand’s tax dispute procedure: Time for a change” (2008) 14 New Zealand Journal of Taxation Law and Policy 425 at 426.

3.2 Interest-based and Rights-based Disputes

Brown (2004) distinguishes between two different approaches which can be applied to disputes in the context of mediation, namely, a rights-based and an interest-based approach. A rights-based approach focuses on the legal rights of the parties and attempts to achieve a resolution “which meets the relevant legal criteria of the dispute in a manner that is consistent with resolutions achieved in a traditional court setting” (Brown, 2004, p 280). Whereas, an interest-based approach focuses on the underlying needs or interests of the parties and “encourages a broader range of solutions or resolutions to the dispute which address the underlying interests, business or otherwise, of the parties instead of, or in addition to, legal interests” (Brown, 2004, p 280).

Mediation was first formally recognised in New Zealand in the early 1990s following developments in the United States and essentially followed an interest-based approach (Fisher, 2010a). The “classical” or “orthodox” model of mediation was formed around “the idea of introducing a neutral third party to the process and focusing on ‘interests and not positions’” (Barton, 2012, p 1). Such an approach “advocates a facilitative model in which a non-interventionalist mediator helps the parties find a ‘win-win’ solution that meets the hidden interests of all concerned” (Barton, 2012, p 1).

Questions have been raised by mediation commentators and practitioners with respect to the applicability of the interest-based approach to certain disputes (Fisher, 2010a, 2010b; Chart, 2012). An interest-based approach may generally be appropriate in “disputes involving personal and family and emotional issues ... or in a commercial environment where there is a continuing relationship” (Fisher, 2012 in Barton, 2012, p 1). However, commentators have suggested that, in practice, a rights-based approach is more likely to be adopted in mediations

of commercial disputes where it is generally not the purpose achieve a better relationship or a “shared understanding” (Fisher, 2010a, p 22). Fisher (2012 in Barton, 2012, p 1) claims that in the majority of commercial disputes, “one side wants as much money as they can get and the other side wants to part with as little money as it can get away with.” Such a situation in the mediation of commercial disputes is arguably similar to that presented by tax disputes. For example, McDonough (1993, p 41) states that:

Tax disputes, however, are more typically focused on obtaining a result, such as “what dollar amount to pay.” The potential solutions are generally exclusive (pay or do not pay) with little room for alternatives.

Nevertheless, Fisher (2010b, p 21) acknowledges that the interest-based and rights-based approaches are not necessarily distinct alternatives to one another and they may overlap:

Even at the hard money end of the spectrum (ie money disputes in which the parties will never see each other again), allowance must be made for the role of emotions (anger, mistrust, face-saving, self-respect, sense of justice, stress etcetera).

3.3 Facilitative and Evaluative Mediation

In assisting parties to reach a mutually acceptable resolution of their dispute, mediators may use different styles of mediation (Brown, 2004). Boulle *et al.* (2008, p 35) advance the four⁷⁵ “most common” models of mediation as being the settlement, facilitative, transformative and

⁷⁵ Note that these four models of mediation are not necessarily exhaustive. For example, Menkel-Meadow derives at least eight possible models of mediation from the literature: Menkel-Meadow C “The many ways of mediation: The transformation of traditions, ideologies, paradigms and practices” (1995) 11 *Negotiation Journal* 217 at 228-230.

evaluative models (see Chapter 2, Section 2.6 above).⁷⁶ However, Palmer and Roberts (1998, p 103) observe that typically, mediators can function in one of two analytically distinct ways; “they can provide a linkage through which negotiations take place [that is, the facilitative model], or they can actively seek to eliminate differences between the parties [that is, the evaluative model].” Boulle *et al.* (2008, p 38) further state that “it is the facilitative/evaluative distinction which is [the most] prominent in mediation debates.”

Riskin (1996, p 9) also claims that “the largest cloud of confusion and contention [in the mediation field] surrounds the issue of whether a mediator may evaluate.” For example, Alfini and Clay (1994, p 8) claim that “effective mediation ... almost always requires some analysis of the strengths and weaknesses of each party’s position.” While Stulberg (1997, p 986) asserts that “any orientation that is ‘evaluative’ is conduct that is both conceptually different from, and operationally inconsistent with, the values and goals characteristically ascribed to the mediation process.” Charlton (2000, p 8) also claims that “mediation [was] derived from the recognition that participants were quite capable of negotiating for themselves and reaching their own decision.”⁷⁷ The mediation literature indicates that it is important to consider whether an evaluative approach should really be considered as a style of mediation, or a completely separate process (NADRAC, 2003; Brown, 2004). The confusion about “what mediation is and should be” creates difficulties when people decide

⁷⁶ The mediation literature notes that, “in practice these [four] models are not always recognised by mediators, though many would have some familiarity with the concepts of facilitative and evaluative mediation.”: Boulle L, Goldblatt V and Green P *Mediation: Principles, Process and Practice* (2nd ed, LexisNexis NZ Ltd, Wellington, 2008) at 35. Given the arguably more limited recognition of the transformative and settlement models of mediation, both in the context of mediation generally and in the context of tax disputes resolution (for example, as noted above in Chapter 2, Section 2.6, the acknowledgment by HMRC of their use of the facilitative and evaluative models of mediation), it is beyond the scope of this study to consider the transformative and settlement models of mediation.

⁷⁷ Charlton further states that: “As any solution was not imposed, but arose out of the empowerment of the parties, it was more likely to be acceptable to both sides and adhered to.”: Charlton R *Dispute Resolution Guidebook* (Law Book Co, Sydney, 2000) at 8.

whether and how to participate in mediation, and with respect to how to select, train, evaluate or regulate mediators (Riskin, 1996, p 8).⁷⁸

3.4 Mediation in Commercial Disputes and Tax Disputes

Commercial disputes constitute one area in which mediation is utilised (MOJ, 2004; Barton, 2012; Hart, 2012).⁷⁹ As suggested in Section 3.2, the use of mediation in this area is arguably applicable to the use of mediation in the context of tax disputes resolution – a point recently noted by HMRC (2012b, p 3): “Various forms of ADR are used in commercial disputes and by a number of overseas tax authorities.” The IGT (2012, p 8) also observes that the implementation of ADR initiatives by revenue authorities generally aligns with “companies and government increasingly seeking to reduce costs and streamline processes.” These parallels indicate that mediation in the context of commercial disputes can perhaps provide a useful background towards the application of mediation in tax disputes (Miller Parr, 2009; Wooten III, 2012).⁸⁰

Spencer and Brogan (2006, p 128) note that in the mediation of many commercial cases, mediators with “industry-specific knowledge” may be required in order to assist with clarifying “complex technical issues.” Garwood’s (1999) analysis of ADR processes for commercial disputes found that nearly all of the mediators interviewed in the study had specialist industry expertise in areas such as construction, shipping or banking or had legal

⁷⁸ For example, Love states that “differences between evaluators and facilitators mean that each uses different skills and techniques, and each requires different competencies, training norms, and ethical guidelines to perform their respective functions.”: Love LP “The top ten reasons why mediators should not evaluate” (1997) 24 Florida State University Law Review 937 at 939.

⁷⁹ In the last published survey (to the researcher’s knowledge) conducted in 2004 by the New Zealand MOJ on ADR in general civil cases in New Zealand, 63 per cent of the ADR practitioner survey respondents reported dealing with disputes involving “commercial relationships and contracts”: Ministry of Justice, above n 67, at 15.

⁸⁰ However, it is beyond the scope of this study to evaluate in-depth, mediation in the context of commercial disputes.

expertise in specialist areas such as franchising or contract law. Garwood (1999, p 84) further found that some of the “specialist commercial mediators” interviewed used “strong evaluative styles, giving opinions on the merits of the case and the legal rights of the parties.” Boulle *et al.* (2008) also state that the view that mediators require expertise in the subject-matter of the dispute is typically associated with the evaluative model of mediation.

In the context of tax disputes resolution, as noted in Chapter 2, Section 2.6, HMRC recognise the possible role of the evaluative model of mediation and accordingly, the use of specialist tax knowledge. HMRC’s *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the use of Alternative Dispute Resolution in Large or Complex Cases* outlines that “facilitative mediation is attempted first, with evaluative mediation following if the initial approach is not successful” (HMRC, 2012b, p 5). The HMRC guidance further explains that:

‘Evaluative mediation’ is a process in which the mediator will try to bring the parties together in exactly the same way as in facilitative mediation, but also providing his/her view of the matter as a specialist in the subject matter of the dispute. (HMRC, 2012b, p 5)

In addition, with respect to the tax mediation regimes in the United States currently utilised by the IRS, the role of the mediator can also “be either facilitative or evaluative, as long as the taxpayer and the representative of the tax collection agency agree” (Meyercord, 2010, p 938). Moreover, Meyercord (2010, p 939) claims that the possibility that the mediator may play an evaluative role suggests that “tax knowledge may be necessary for the mediator to evaluate the taxpayer’s case.” Wei (2001, p 567) further states that “the selection of the mediator is important as tax statutes are known for their complexity” and a mediator without the necessary tax expertise may slow down the mediation process because they are not

familiar with tax issues and the tax law. Accordingly, the IRS's Post Appeals Mediation (PAM) program requires the use of an "[IRS] Appeals [Office] employee who is a trained mediator" (Meyercord, 2010, p 938). However, Meyercord (2010, p 938) notes that some of the "perception problems" associated with the IRS's mediation programs stem, in part, from the failure of the IRS to provide an "independent" mediator. Parsly (2007, p 686) further claims that if one of the parties questions the mediator's neutrality, that party may be hesitant to fully disclose information and "moreover, that party is then more inclined to be suspicious of the mediator's guidance, evaluation of the case, and settlement recommendation if one is given." This highlights that in the context of the mediation of tax disputes, a potential trade-off may exist between the independence and perceived neutrality of the mediator, and the requirement for the mediator to have specialist tax knowledge or expertise.

3.5 Mediation Rhetoric and Reality

The purpose of this section is to highlight that various issues currently exist in the area of mediation and moreover, that mediation should not be thought of as a panacea for the resolution of all disputes, both in the context of dispute resolution generally as well as in tax disputes resolution. A number of New Zealand mediation commentators have expressed concerns with respect to certain practices adopted by those operating in the mediation field (Chart, 2012; Beech, 2012). Fisher (2012 in Barton, 2012, p 1) considers that "there is a mismatch between mediation rhetoric and reality" in the profession.

Chief High Court Judge, Justice Helen Winkelmann, in an address to the AMINZ annual conference, *ADR and the Civil Justice System*, on 6 August 2011, noted that in New Zealand "cases are being referred to mediation in greater numbers by lawyers", but also stated that "mediation in all its forms is not universally good when viewed from the perspective of the

litigant or the state” (Winkelmann J, 2011, p 1). Winkelmann J (2011) further raised a number of concerns with respect to the way in which mediation is practiced in New Zealand, suggesting, *inter alia*, that:

- Some mediators are wrongly focusing on achieving settlement.
- The quality of party decision making is suffering because mediations are unreasonably prolonged until settlement is reached.
- Mediated outcomes are being affected by power imbalances.
- Mediation is being wrongly promoted by an anti-litigation discourse.

Such concerns may also need to be borne in mind in considering the application of mediation in tax disputes resolution. The above issues (while not an exhaustive list) are expanded upon in Sections 3.5.1-3.5.4 and additional issues are considered in Section 3.5.5. Although, as Chapman (2011, p 1) notes:

... the relative paucity of research in New Zealand about many aspects of ADR limits informed debate and requires us [that is, ADR practitioners and/or commentators] to rely to a considerable degree on personal experience and anecdote.

3.5.1 Focusing on Settlement

Winkelmann J (2011, p 7) stated that:

... it is apparent that there are mediators for whom a significant (if not primary) focus is achieving settlement. When mediators sell their services by reference to the percentage of

settlements they achieve, the inevitable inference is that the mediator has developed a personal stake in the settlement of the case.

Winkelmann J (2011, p 8) claimed that some mediators use “tricks of the trade and the processes of mediation, to drive settlement irrespective of the dynamic that is operating in the room, and irrespective of the quality of the settlement.” This can have the effect of “manoeuvring unsophisticated parties into disadvantageous positions from which they cannot readily resile” (Chapman, 2011, p 1). Chart (2012) also claims that there is evidence that higher rates of settlement indicate the use of more coercive approaches by mediators. Associated with these dynamics is “the growing phenomenon of satellite litigation, in which parties who perceive the mediation process as being coercive subsequently claim duress or undue influence” (Chart, 2012, p 1).⁸¹ Chapman (2011, p 1) further explains that: “Whatever the substantive outcome, a party is unlikely to be satisfied if he or she perceives the process as unfair.”

3.5.2 Prolonging Mediation Until Settlement is Reached

Winkelmann J (2011) observed that mediators may also commit to achieving a settlement, or insist on keeping the parties in mediation until they settle. Winkelmann J (2011, p 7) claimed that unreasonably prolonged mediations were consequently adversely impacting on the quality of party decision making: “Sometimes settlements are reached in the early hours of the morning, by which time, the parties will be exhausted and their decision making

⁸¹ See, for example, *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620, which highlighted the need for clarity for all parties regarding when an agreement is reached at mediation. See also, a case in Australia, *Barry v City West Water Ltd* [2002] FCA 1214, which involved parties in eight days of litigation in the Federal Court of Australia with respect to whether an agreement had been reached in one-day mediation.

impaired.”⁸² Such practices had the potential to “imperil the quality and hence the benefits of the mediation process” (Winkelmann J, 2011, p 6).⁸³

3.5.3 Power Imbalances

Winkelmann J (2011) noted a number of factors which could lead to power imbalances in the mediation:

- Disparities in monetary or other material resources, resulting in a party having difficulty in conducting or continuing litigation.
- Relative lack of ability to collect and analyse information needed to predict the likely outcome of litigation.
- A need for immediate settlement.
- Disparities in experience on the part of counsel in the dynamics of the mediation or the practices of the mediator.⁸⁴

⁸² Chart also claims there is anecdotal evidence of mediators keeping parties until 3 am in the morning in order to achieve a settlement: Personal correspondence with Jane Chart, negotiation and conflict resolution practitioner and trainer, Christchurch, 12 March 2012. However, Sharp counters such claims, commenting that: “The days of finishing at 2 am in the morning are gone ... we are no longer having mediation by attrition.”: Geoff Sharp in Barton C “Disputes settled without going to court” *The New Zealand Herald* (online ed, Auckland, 9 March 2012) <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10790835> at 1.

⁸³ The issues of mediators focusing on achieving settlement (as noted in Section 3.5.1) and prolonging mediation until settlement is reached are arguably greater issues in instances where mediators operate independently rather than as part of “dedicated mediation service.” See Chart J “What is ‘successful’ family mediation?” *NZLawyer Extra* 42 (online ed, Auckland, 3 February 2012) <<http://www.nzlawyermagazine.co.nz>> at 1. It should also be noted that in the context of the New Zealand tax disputes resolution procedures, the issues of mediators focusing on achieving settlement and prolonging mediation until settlement is reached appear to be at contrast with Inland Revenue’s apparent reluctance to settle disputes progressing through all stages of the disputes procedure as noted in Chapter 2, Section 2.4.

⁸⁴ Note that this list of power imbalances is not exhaustive. For further examples, see Chapman R “Mediation: Are we getting things right?” *NZLawyer Extra* 36 (online ed, Auckland, 14 October 2011) <<http://www.nzlawyermagazine.co.nz>> at 1.

Winkelmann J (2011, p 7) asserted that “mediation can increase the power of the strong over the weak, magnifying power imbalances and opening the door to coercion and manipulation by the stronger party.” Chart (2012, p 1) further notes that “some people come to mediation ... seeking merely to fish for information, to wear down the other party, or to delay matters.” Nevertheless, power imbalances may affect the outcomes of many disputes, whether they are resolved by consensus or adjudication (Chapman, 2011).⁸⁵ In the context of mediation in tax disputes resolution, McDonough (1993, p 38) also observes that:⁸⁶

The great disparity which exists between the power held by each party, in terms of dollar backing and access to legal resources, further disfavors mediation when the taxpayer is pitted against the government.

3.5.4 The Anti-litigation Discourse

Winkelmann J (2011, p 8) noted that the case for mediation is often made “by setting it up in opposition to court adjudication and promoting through it an anti-litigation discourse which suggests that litigation is always expensive, unpleasant, and unnecessary.” The anti-litigation narrative carries with it the danger of undermining the civil court system, by eroding confidence in it (Winkelmann J, 2011). Winkelmann J (2011, p 2) asserts that “such an outcome is not in the interests of society as ultimately it will undermine the rule of law.”

⁸⁵ Chapman states that the presence of power imbalances “is not necessarily a reason not to mediate. Rather, mediators must address power imbalances both to see whether the parties are able to negotiate effectively, and to manage the dynamics they create.”: *ibid.*

⁸⁶ NZLS/NZICA note that there is an imbalance of power and knowledge in the context of tax disputes resolution in New Zealand: “Inland Revenue has a staff of 6,500 people, many of whom have decades of tax experience and there is a division within Inland Revenue that is dedicated to litigation of tax disputes. A taxpayer may only run into a tax dispute once or twice in a lifetime, whereas Inland Revenue officials deal with these matters on a daily basis and there is sufficient experience within Inland Revenue to ensure that specialist advice is at hand at no cost.”: Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *Disputes: A Review*, July 2010 (Wellington, 2010) at [3.51].

Chapman (2011, p 1) also states that the “claimed advantages for mediation which resonate with many participants are the saving[s] in time (both in the lead period up to trial and the length of the hearing) and cost.” However, the evidence supporting such claims in New Zealand is still “largely anecdotal” (Chapman, 2011, p 1). Moreover, studies in North America and the UK have tended to produce inconclusive or conflicting results (Lord Neuberger of Abbotsbury Master of the Rolls, 2010).⁸⁷

Accordingly, Chapman (2011, p 1) claims that “absolute statements that mediation is cheaper and quicker are difficult to substantiate as universal truths, and suggest that mediation is sometimes being oversold.” Some disputes are not susceptible to settlement by mediation; they may require a ruling to establish a principle or set a precedent (Chapman, 2011). Chapman (2011, p 1) further states that “a court may have to intervene to ensure that something is done or not done” and “the dynamics of the dispute may also make consensual resolution impossible.”⁸⁸

3.5.5 Other Issues

Chart (2012, p 1) states that “the early thinking about mediation saw agreement rates as the key, if not the sole indicator of success.” However, the mediation research suggests that “reliance on such short-term quantitative measures may obscure factors which are of greater significance to mediation clients” (Chart, 2012, p 1). Research by Bush (1996, p 17) found that the most frequently given reasons for parties’ satisfaction with mediation included the following:

⁸⁷ See, for example, the sources cited by Lord Neuberger of Abbotsbury Master of the Rolls “Has Mediation had its Day?” (Gordon Slynn Memorial Lecture, 10 November 2010) at [21]-[23].

⁸⁸ See Chapter 4, Section 4.2 below, for examples of certain types of tax disputes that may not be appropriate for mediation.

mediation enabled the parties to deal with the issues they themselves felt important; it allowed them to present their views fully and gave them a sense of having been heard; it helped them to understand each other.

Bush (1996) also found that parties do not place the most value on the fact that a process provides expediency, efficiency or finality of resolution. “Not even the likelihood of a favorable substantive outcome is considered most important” (Bush, 1996, p 20). Rather, an equally, if not even more highly, valued feature was found to be “‘procedural justice or fairness’, which in practice means the greatest possible opportunity for *participation* in determining outcome (as opposed to assurance of a favorable outcome), and for self-expression and *communication*” (Bush, 1996, p 20). (emphasis in original)

The theory of people needing “process satisfaction”⁸⁹ rather than simply an outcome to any conflict” has been the subject of further mediation research in Australia (Powell, 2013, p 22).⁹⁰ A recent study conducted by Fox (2012, p 6) confirms the finding that mediation clients value procedural justice (that is, “a fair process”) more highly than an agreement being reached. Moreover, Fox (2012, p 16) found that parties valued the mediator’s use of “professional strategies to facilitate communication and settlement.” As noted in Chapter 2, Section 2.5.1, procedural justice is a relevant factor in the context of tax disputes resolution.⁹¹

⁸⁹ Process satisfaction in a dispute resolution process involves satisfaction in relation to three areas: procedural (satisfaction that the process was transparent and met the expectations of the participants); substantive (satisfaction concerning the content of the dispute – a sense that the subject matter of the dispute was discussed); and psychological (satisfaction in terms of a sense of fairness and the parties feeling able to express the emotional impact): Powell C “Alternative dispute resolution” [2013] New Zealand Law Journal 21 at 22.

⁹⁰ See, for examples, Sourdin T and Thorpe L “Consumer perceptions of dispute resolution processes” (2008) 15 Competition and Consumer Law Journal 337; and Fox G “The effectiveness of the Dispute Settlement Centre of Victoria in meeting client needs: Implications for practice” (paper presented to the National Mediation Conference 2012, Sydney, 10-14 September 2012).

⁹¹ See, for examples, Murphy K “Regulating more effectively: The relationship between procedural justice, legitimacy, and tax non-compliance” (2005) 32 Journal of Law and Society 562; Wenzel M “Tax compliance and the psychology of justice: Mapping the field” in V Braithwaite (ed) *Taxing Democracy: Understanding Tax*

Keating and Lennard (2011, p 6) note that in New Zealand, “much tax litigation continues to revolve around not whether a tax position is correct but how the procedure for resolving that dispute should be applied.” Accordingly, achieving process satisfaction (in mediation) is an aspect that would need to be considered in the utilisation of mediation as a form of tax disputes resolution in New Zealand.

To date, the mediation profession in New Zealand has been self-regulating. As previously noted, New Zealand has two mediator bodies providing professional self-regulation on a voluntary basis: AMINZ and LEADR (Boulle *et al.*, 2008). Chapman (2011, p 1) states that “those who are members of the AMINZ and LEADR panels have been trained and are subject to codes of ethics and conduct.” To maintain their status as panel members, they must satisfy continuing practice standards. However, it is unclear as to how these requirements influence the “professionalism” of mediators generally (Chapman, 2011, p 1). Chart (2012, p 1) states that although, “mediation clearly offers many benefits ... it is not a panacea.” Mediator support and supervision are critical to delivering high-quality mediation services in New Zealand and may go part way towards addressing the claimed disjunction between mediation rhetoric and reality.⁹² Furthermore, Chart (2012, p 1) believes that the mediation field is “still evolving” and whatever systems are put into place, “there is a compelling need for further research specific to the New Zealand context to ensure that policy is driven by hard evidence and best practice.” This is arguably equally applicable with respect to the

Avoidance and Evasion (Ashgate Publishing Ltd, Aldershot, 2003) 41; and Tyler TR *Why People Obey the Law* (Yale University, New Haven, 1990).

⁹² However, “[t]his [mediator support and supervision] requires particular attention when mediators operate independently rather than as part of dedicated mediation service.”: Chart, above n 83, at 1.

proposed application of mediation within the New Zealand tax disputes resolution procedures.⁹³

3.6 Summary

This chapter discusses the distinction between rights-based and interests-based disputes as well as the facilitative and evaluative models of mediation. The chapter then highlights various practical issues which exist in the mediation field in the general context, including: mediators wrongly focusing on achieving settlement, mediations being prolonged until settlements are achieved, mediated outcomes being affected by power imbalances and the promotion of mediation through an anti-litigation discourse. Notwithstanding these and other issues, the current use of mediation both in commercial disputes and by various overseas revenue authorities indicates the applicability and acceptance of mediation in resolving tax disputes. In the context of New Zealand, the suggestions for tax mediation made by various tax commentators and professional bodies as well as Inland Revenue's inclusion of the option for conference facilitation, provide further support for the use of mediation in tax disputes resolution. The next chapter outlines Jone and Maples' (2012b) proposed New Zealand tax mediation regime.

⁹³ In addition, O'Brien recognises the advantage of being able to learn from the role of mediation in other jurisdictions: "perhaps as we move forward ... we should be looking not only to the United Kingdom and the United States but to our closest neighbours. The work of NADRAC in Australia has led to an ever growing body of research and an effective forum for government, the judiciary, academics and practitioners to consider not only the role of mediation but the wider range of alternative dispute resolution processes in the context of access to justice. Is the time now right for NADRAC NZ style?": O'Brien G "Letter to the editor: Mediation and the civil justice system" *NZLawyer* 167 (Auckland, 26 August 2011) at 6. It should also be noted that the three jurisdictions identified by O'Brien also employ various forms of mediation in the context of tax disputes resolution.

Chapter 4

Literature Review: Jone and Maples' (2012b) Proposed New Zealand Tax Mediation Regime

4.1 Introduction

This chapter outlines the proposed New Zealand tax mediation regime developed by Jone and Maples (2012b) that this study seeks to refine. Section 4.2 provides an overview of the key features of the regime and Section 4.3 outlines the mediation process and suggested timeframes. Section 4.4 then discusses some additional issues with respect to the implementation of the proposed tax mediation regime for New Zealand including the need for a genuine commitment to the process by both the revenue authority and taxpayers alike. Section 4.5 summarises the chapter.

4.2 Key Features of the Mediation Regime

Jone and Maples (2012b) suggest a tax mediation regime for New Zealand administered by an enhanced TRA. Mediation would become a legislated phase of the tax disputes resolution procedures under Part IVA of the TAA 1994 (and the corresponding administrative guidelines would be incorporated within new Inland Revenue SPSs). Information provided at mediation would be confidential and would not be able to be used in a later hearing unless parties agree. The confidentiality of information exchanged during the mediation process would also be legislatively provided for under Part IVA of the TAA 1994.

Mediators would be independent of Inland Revenue. They would normally be a member of a panel of specialist tax mediators approved and appointed by the TRA and employed by the Courts of New Zealand. The panel would consist of specialist tax professionals (for example,

tax accountants and lawyers) with suitable industry experience and knowledge of the tax law. Members of the panel must also be suitably qualified and experienced in mediation (for example, be a current member of one of the two accredited professional organisations of mediators in New Zealand: AMINZ or LEADR). There would also be the option for the parties to the dispute to request a private mediator. However, TRA approval of the private mediator must be obtained.

The mediation phase of the disputes resolution procedures would automatically follow after the issuance (and subsequent rejection by the other party) of a NOR by a taxpayer (or the Commissioner). Mediation, with limited exceptions, would be mandatory for all types of tax disputes. Mediation may not be appropriate, where: it would be in the public interest to have judicial clarification of the issues in dispute; resolution can only be achieved by departure from an established 'Inland Revenue view' on a technical issue; the dispute is of a kind where the state of the relationship between the parties is such that any proposed mediation is unlikely to be successful; the dispute concerns a frivolous issue or it involves certain procedural issues.

The provision of mediation services would be met by the Courts of New Zealand, unless a private mediator is engaged. The mediator would normally adopt a facilitative role in promoting and encouraging discussion between the parties and assisting them to reach their own resolution. However, the mediator could also adopt an evaluative role if the parties agree to allow the mediator to make a recommendation on how to resolve the dispute. In such instances the mediator's recommendation would then be full, final and enforceable unless

either of the parties notifies the mediator within seven days of the mediator's recommendation, that they reject the recommendation made.⁹⁴

Taxpayers may represent themselves or choose to have representation (with the necessary decision-making authority if the taxpayer is absent from the mediation). Inland Revenue officers at the mediation would need to have requisite authority to negotiate and settle. To ensure that mediation is not used by the parties as a delaying tactic, the mediation phase of the tax disputes resolution procedures would be made available to parties only once per tax dispute. However, more than one mediation session may be held (during the mediation phase) if this is deemed beneficial by the parties and the mediator. Matters unresolved at mediation may proceed to a hearing in the TRA or High Court.

Table 4.1 outlines the suggested key features of Jone and Maples' (2012b) proposed New Zealand tax mediation regime.⁹⁵ The survey questionnaire utilised in this study (see Appendix 2) will seek respondents' feedback on the suggested features outlined in the table. The table of key features will consequently be refined based on the results obtained from the survey questionnaire and the feedback obtained from the participants in focus group interview.

⁹⁴ This procedure is based on an equivalent procedure followed by the Department of Labour's (DOL's) mediation services in the New Zealand Employment Court. See s 149A Employment Relations Act 2000.

⁹⁵ Table 4.1 was prepared using information collated from Jone M and Maples AJ "Mediation as an alternative option in New Zealand's tax disputes resolution procedures" (2012b) 18 New Zealand Journal of Taxation Law and Policy 412.

Table 4.1: Suggested Key Features of Jone and Maples’ (2012b) Proposed Tax Mediation Regime

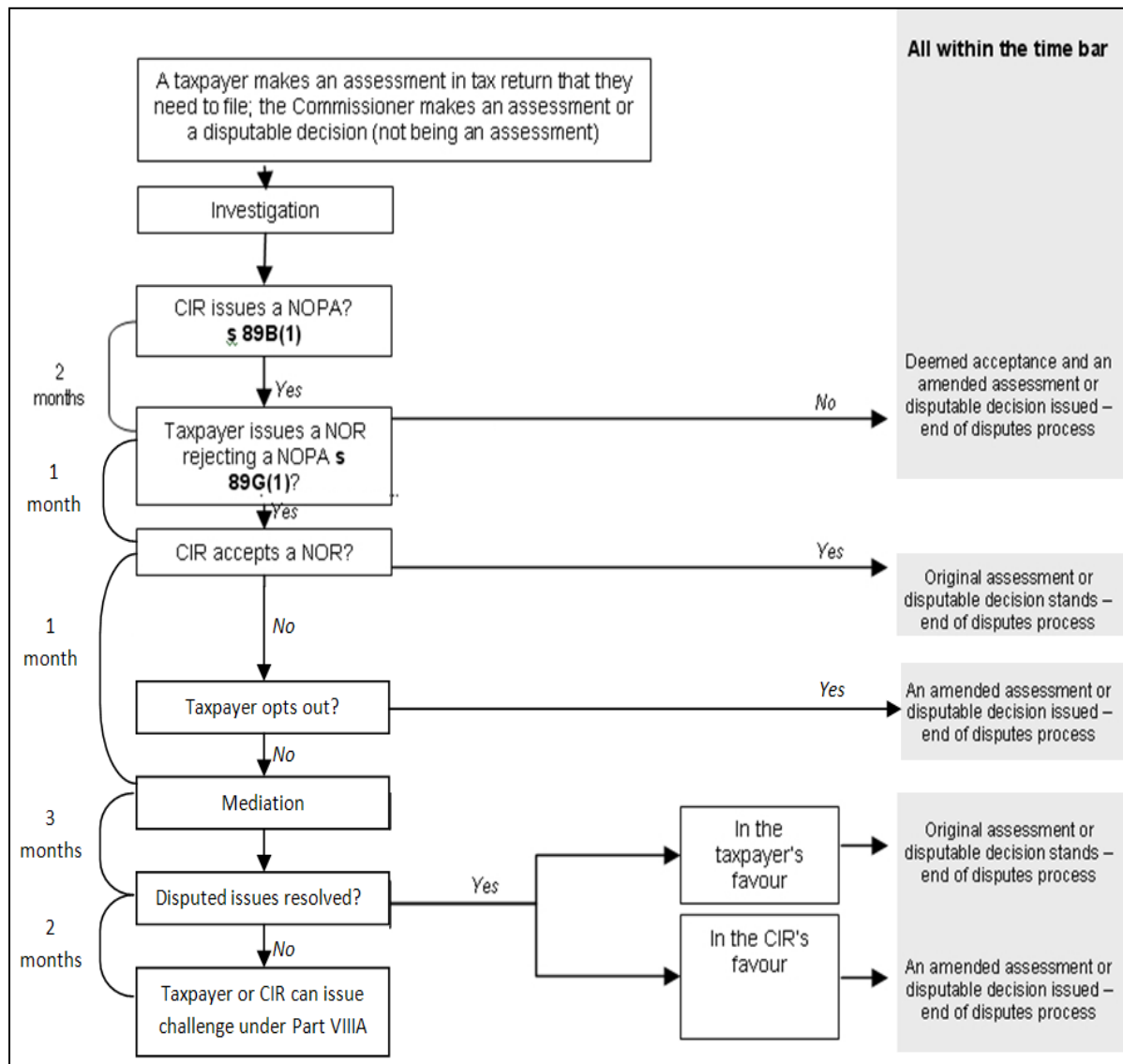
Tax Mediation Regime Features	Suggestions for New Zealand
Legislation	Part IVA TAA 1994
Mediator type	Member of a panel of independent specialist tax mediators appointed by (an enhanced) TRA and employed by the Courts of New Zealand, or in instances where the parties request a private mediator, a person engaged for the purpose and considered to be suitable by the TRA.
Confidentiality	Information provided at mediation is confidential and is not able to be used in a later hearing unless parties agree. The confidentiality of information exchanged during the mediation process would be legislatively provided for under Part IVA of the TAA 1994.
Mandatory	Mediation is mandatory (subject to the exclusions below).
Stage of the disputes resolution process that the mediation phase occurs	After the issue (and subsequent rejection by the other party) of a NOR by either the taxpayer or the Commissioner.
Types of disputes mediation is available for (and types of disputes excluded)	The types of disputes for which mediation is available is not restrictive. However, mediation may not be appropriate where: it would be in the public interest to have judicial clarification of the issues in dispute; resolution can only be achieved by departure from an established ‘Inland Revenue view’ on a technical issue; the dispute is of a kind where the state of the relationship between the parties is such that any proposed mediation is unlikely to be successful; the dispute concerns a frivolous issue; or the dispute involves certain procedural issues.
Cost to taxpayer disputant(s)	None. However, if a private mediator is engaged by the parties, then the costs involved in employing the mediator are to be agreed on between the parties.
Number of times that the mediation phase can occur in the tax disputes resolution process	Once. However, more than one mediation session may be held during the mediation phase if this is deemed beneficial by both of the parties and by the mediator.
Role of mediator (that is, facilitative and/or evaluative)	<p>Facilitative. The mediator will assist the parties to identify the disputed issues, develop options and consider alternatives in an endeavour that the parties reach their own agreement on the issue(s) in dispute. The mediator will have no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution between the parties is attempted.</p> <p>Evaluative. If an agreement cannot be reached by the parties through mediation, the parties can together choose to allow the mediator to make a recommendation on how to resolve the dispute.</p>
Binding agreement	<p>Any agreement reached by the parties themselves through mediation is final and binding on them once the agreement is signed by both of the parties and the mediator.</p> <p>Where the parties together agree to give the mediator the authority to make a recommendation on how to resolve the dispute; the mediator’s recommendation will then be full, final and enforceable unless either of the parties notifies the mediator within seven days of the mediator’s recommendation; that they reject the recommendation made.</p>

4.3 Process and Timeframes of the Mediation Regime

Jone and Maples' (2012b) modified New Zealand tax disputes resolution procedures (including suggested timeframes) incorporating the proposed mandatory mediation phase are outlined in diagrammatic form in Figures 4.1 and 4.2 below.⁹⁶ Jone and Maples (2012b) proposed that the suggested timeframes pertaining to the modified New Zealand tax disputes resolution procedures would be legislated for under Part IVA of the TAA 1994.

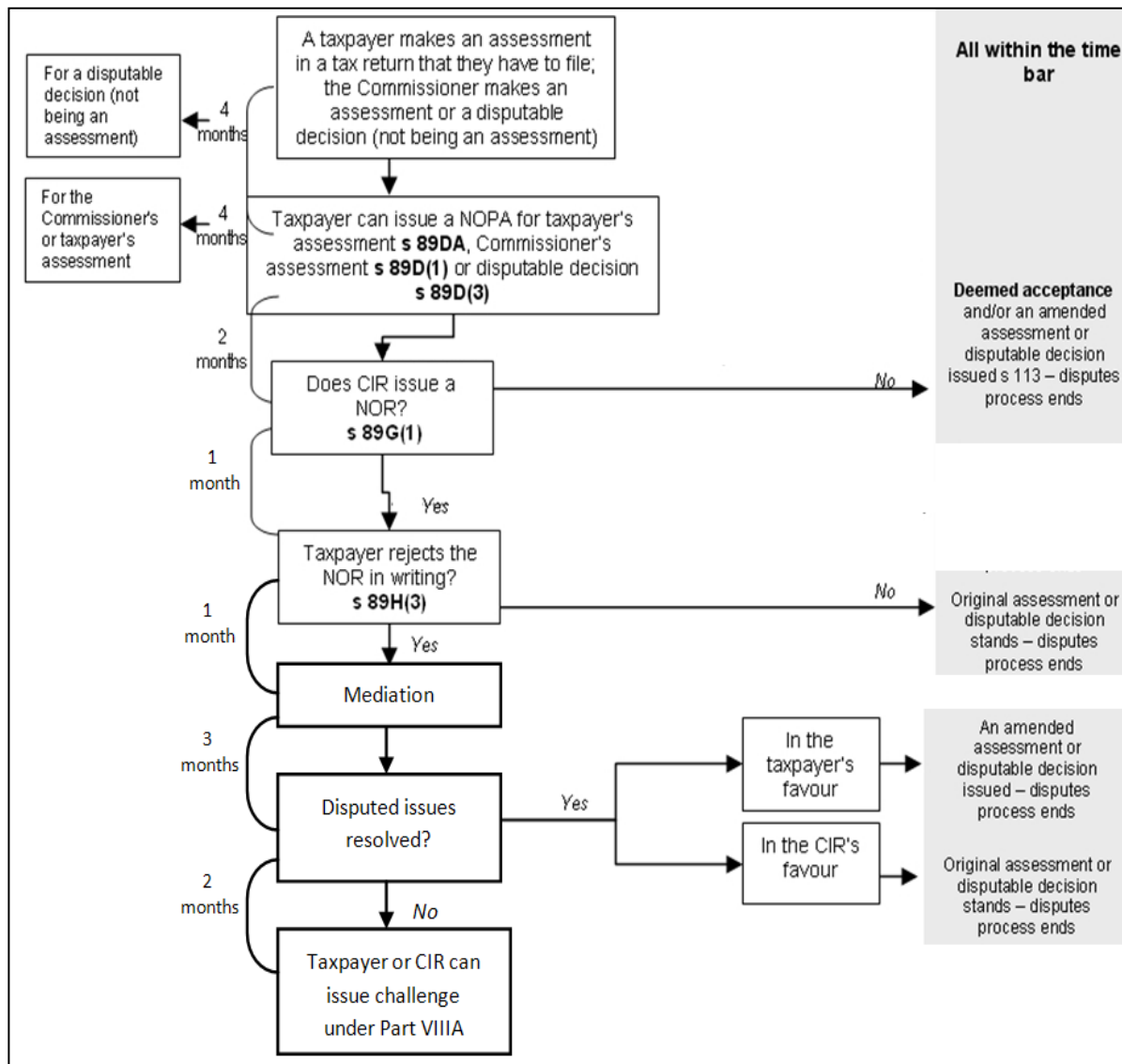
⁹⁶ Note that, the path of tax disputes which were not deemed suitable for mediation was not considered by Jone and Maples (2012b).

Figure 4.1: Jone and Maples' (2012b) Proposed New Zealand Tax Disputes Resolution Process Commenced by the Commissioner of Inland Revenue



Source: Jone and Maples (2012b, p 438)

Figure 4.2: Jones and Maples' (2012b) Proposed New Zealand Tax Disputes Resolution Process Commenced by a Taxpayer



Source: Jones and Maples (2012b, p 439)

In disputes commenced by the Commissioner (see Figure 4.1), the issue of a NOR by the taxpayer (followed by the issue of a rejection of the taxpayer's NOR by the Commissioner within one month) automatically initiates the mandatory mediation process. However, the taxpayer has the opportunity to opt out of mediation (and end the disputes process at this point), thus accepting Inland Revenue's position,⁹⁷ by notifying Inland Revenue of their decision to opt out within two weeks⁹⁸ of the Commissioner's rejection of the taxpayer's NOR.⁹⁹

In disputes commenced by a taxpayer (see Figure 4.2), the issue of a rejection by the taxpayer within one month of the Commissioner's NOR, automatically initiates the mandatory mediation process. Neither the taxpayer nor the Commissioner has the ability to opt out of mediation (and end the disputes resolution process) where the dispute is commenced by the taxpayer.¹⁰⁰

⁹⁷ The opt out feature of Jones and Maples' (2012b) proposed New Zealand tax mediation regime refers to when the taxpayer chooses to accept the Commissioner's position and therefore decides not to proceed further with the dispute. On choosing to opt out (of mediation) the taxpayer ends the disputes resolution process at this point and the taxpayer cannot file court proceedings. This is distinct from the opt out feature as used in the context of the current disputes resolution procedures where, after the conference phase, the taxpayer can request to opt out of completing the remainder of the disputes procedures and proceed to court if the taxpayer has "participated meaningfully" in discussions during the conference phase and certain other criteria are met.

⁹⁸ This two week timeframe is consistent with the timeframe to opt out of current disputes resolution process where the taxpayer has two weeks from the end of the conference phase to elect to opt out of the disputes resolution process and proceed to court: Inland Revenue "SPS 11/05", above n 14, at 34, [179] and Inland Revenue "SPS 11/06", above n 14, at 70, [210].

⁹⁹ In disputes commenced by the Commissioner, the Commissioner does not have the option to opt out of mediation (and therefore end the disputes resolution process). This is on the basis that the Commissioner would have had the earlier opportunity to consider and accept the taxpayer's position through accepting the taxpayer's NOR.

¹⁰⁰ This is on the basis that the Commissioner would have had the opportunity to opt out of the disputes process earlier through choosing not to issue a NOR. Similarly, the taxpayer would have had the opportunity to opt out through accepting the Commissioner's NOR.

In all tax disputes, whether commenced by the Commissioner or taxpayer, Inland Revenue must file the NOPA, NOR and other relevant documentation with the TRA within one month of the issue of a rejection of a NOR by the taxpayer (or the Commissioner).

In the instances where the taxpayer wishes to engage a private mediator, they must notify Inland Revenue. Inland Revenue and the taxpayer would then jointly select a private mediator and determine how the costs are to be allocated between the parties. This information must also be filed with the TRA by Inland Revenue along with the NOPA, NOR and other relevant documentation.

The receipt of the above information by the TRA officially marks the start of the mediation phase. Upon receipt of the information the TRA will assess whether the dispute is appropriate for mediation. It is proposed that limited judicial review by the High Court of a TRA decision to (or not to) mediate a certain dispute will be available to the parties. The TRA will contact the taxpayer and Inland Revenue within one month of the receipt of the information and provided that the dispute is appropriate for mediation; will provide both parties with details of the date, time and place of mediation. By default, the mediator will be allocated from the TRA's panel of specialist tax mediators. If a private mediator has been requested by the parties, the TRA will also notify the taxpayer and Inland Revenue whether the mediator selected by the parties has been approved.

Any agreement reached by the parties through mediation would be final and binding on the parties once the agreement is signed by both parties and the mediator. The signed agreement is then lodged with the TRA. The length of the mediation phase (starting from the receipt of the NOPA, NOR and other relevant information by the TRA from Inland Revenue) is

expected to be completed within three months, subject to the facts and complexity of the dispute. Jone and Maples (2012b) suggest that with the consent of both the taxpayer and the Commissioner, the TRA may extend the mediation phase beyond three months.¹⁰¹ Litigation for unresolved matters may only be commenced upon completion of the mandatory mediation phase. However, the taxpayer (or the Commissioner) must file proceedings with the TRA or High Court within two months from the end of the mediation phase.¹⁰²

4.4 Other Issues

Jone and Maples (2012b) also note that there are other factors which could potentially contribute towards the success (or otherwise) of a tax mediation regime for New Zealand's tax disputes resolution procedures. Based on the experiences of tax mediation in the United States and Australia,¹⁰³ Jone and Maples (2012b) suggest that the success of a tax mediation regime in part depends on whether there is a genuine commitment to the mediation process by both the revenue authority and taxpayers. In addition, the authors refer to the need for a "culture change" within the tax authority (Jone and Maples, 2012b, p 442). This was also a point recently observed by the IGT in his *Review into the ATO's use of early and Alternative Dispute Resolution: A report to the Assistant Treasurer* which, amongst other things, was

¹⁰¹ Note that the conference phase of the current tax disputes resolution procedures may also be extended beyond three months "if the parties are engaged in meaningful discussions.": Inland Revenue, "SPS 11/05" above n 14, at 31, [154] and Inland Revenue "SPS 11/06" above n 14, at 67, [185].

¹⁰² This timeframe is consistent with the timeframe of the "two-month response period" used in the current disputes resolution procedures. See Inland Revenue "SPS 11/05", above n 14, at 41, [280] and Inland Revenue "SPS 11/06", above n 14, at 78, [306].

¹⁰³ For further information, see the IRS's Fast Track Mediation (FTM) program, provided for in Internal Revenue Service *Revenue Procedure 2003-41: SB/SE – Appeals Fast Track Mediation Procedure* (2003) <<http://www.irs.gov/pub/irs-drop/rp-03-41.pdf>>; the IRS's PAM program, provided for in Internal Revenue Service "Rev Proc 2009-44" *Internal Revenue Bulletin 2009-40* (5 October 2009) <<http://www.irs.gov/pub/irs-irbs/irb09-40.pdf>>; and the ATO's use of tax mediation in the Administrative Appeals Tribunal (AAT) and in the Federal Court of Australia, provided for in the ATO's "Practice Statement Law Administration 2007/23" (Australian Taxation Office, above n 72). For a discussion of these regimes, see also Jone M and Maples AJ "Mediation as an alternative option in Australia's tax disputes resolution procedures" (2012a) 27 Australian Tax Forum 529.

prompted by Federal Government initiatives seeking “to encourage a shift in the community and federal agencies towards a resolution culture” (IGT, 2012, p v).

With respect to the revenue authority, there needs to be a commitment to use mediation – a commitment which is reflected in the revenue authority’s processes, resource allocation and training (Jones and Maples, 2012). The approach of the ATO towards tax mediation, which has previously been described by the Law Council of Australia (2011, p 3) as “inconsistent and directionless”, suggests that tax mediation cannot be implemented in a haphazard manner (IGT, 2011a).¹⁰⁴ Although arguably more of a systemic issue, Dunne and Romanin (2010, p 22) observe that the Australian tax objection procedures do not facilitate the early resolution of disputes as “there is no required process for taxpayers to meet with and discuss the particular dispute with the Tax Office at an early stage.” That is, there is no legislative framework ensuring an early settlement of a dispute. As a result, “it appears that ADR is not actively being pursued by the Tax Office until it is required to do so as part of the Tribunal or Court processes” (Dunne and Romanin, 2012, p 22). However, unlike Australia, New Zealand is potentially better positioned to introduce mediation processes early in the dispute resolution process given that the current process already places emphasis on the early resolution of disputes (Jones and Maples, 2012b).¹⁰⁵ If there is the willingness to change and adopt mediation processes within Inland Revenue, “the introduction and inclusion of such

¹⁰⁴ Stakeholder submissions to the IGT’s *Review into the Australian Taxation Office’s use of early and Alternative Dispute Resolution: A Report to the Assistant Treasurer* noted that: “a lack of understanding of dispute resolution techniques on the part of officers at various levels within the ATO, the inability to depart from established procedures and policies in appropriate cases and senior officers not being involved until late in the dispute process all contributed to foregone opportunities for the ATO and taxpayers to address issues in a timely and cost-effective manner without resort to litigation”: Inspector-General of Taxation, above n 64, at 1.

¹⁰⁵ The “prompt and efficient resolution of any dispute concerning a disputable decision by requiring the issues and evidence to be considered by the Commissioner and a disputant before the disputant commences proceedings” constitutes part of the purposes of the disputes procedures in New Zealand as outlined in s 89A TAA 1994..

processes should be easier to achieve in such an environment – indeed, in one sense it would be a logical extension of facilitated conferences” (Jones and Maples, 2012b, p 436).

A successful mediation program also depends on the incorporation of mediation into a tax authority’s overall approach towards dispute resolution and encouraging voluntary compliance. For example, the inclusion of mediation within New Zealand’s tax disputes resolution procedures would require a committed shift in the approach of Inland Revenue so that any future tax mediation regime is focused on resolution. In the past it has been observed that “the current Inland Revenue conference stage is either not held, or treated as an evidence gathering exercise by the Inland Revenue investigator rather than as a forum for resolution” (Joanne Dunne, 2009, p 4).¹⁰⁶ The proposed use of tax mediation in New Zealand would also require a change in the culture of Inland Revenue staff towards settlement (and compromise). As noted in Chapter 2, Section 2.4, with respect to settlement generally, there is “a common reluctance on the part of the Commissioner’s staff to consider settlement, or to entertain settlement offers in a serious way, even when a serious and genuine dispute exists” (Lennard, 2008a, p 32).

In Australia, it has also been observed that a significant barrier to the use of tax mediation is the widespread lack of knowledge and understanding amongst taxpayers (NADRAC, 2009a). Therefore, an increase in the awareness of tax mediation amongst taxpayers (and their advisors) should lead to an increase in the willingness of all parties to the dispute to embrace mediation. This increased awareness needs to be driven in part by adequate promotion of a

¹⁰⁶ However, more recently Keating notes that: “The Commissioner is not obliged to offer a conference, nor is the taxpayer required to attend. Nevertheless, it is the IRD’s invariable practice to offer the taxpayer a conference with the aim of resolving, or at least narrowing, the matters in dispute.”: Keating, above n 11 at 165.

tax mediation regime by tax authorities.¹⁰⁷ NADRAC (2009a) suggest that to increase the public's awareness of ADR there should be a high quality, easy to understand information about ADR (and its benefits) to stakeholders. Further, NADRAC (2009a, p 3) also recommend that "courts and tribunals prominently provide information about ADR on their websites, and ensure that their staff have the information and training necessary to inform disputants about appropriate ADR services." Jone and Maples (2012b) make similar suggestions for both general and targeted information campaigns on tax mediation in New Zealand. They suggest that this would involve:

Inland Revenue and the Courts of New Zealand educating NZICA, NZLS, Tax Agents' Institute of New Zealand (TINZ)¹⁰⁸ and CPA Australia members who would in turn disseminate this information to their taxpaying clients. (Jone and Maples, 2012b, p 437)

4.5 Summary

Jone and Maples (2012b) proposed a mandatory tax mediation regime for New Zealand administered by an enhanced TRA and occurring following the NOR stage of the current tax disputes resolution procedures. This chapter outlines the key features of Jone and Maples' (2012b) proposed New Zealand tax mediation regime, including: the mediator type; the confidentiality of the mediation; the types of disputes mediation is available for; the cost to the taxpayer of mediation; the number of times that the mediation phase can occur in the disputes resolution process; and the role of the mediator. In addition, this chapter highlights

¹⁰⁷ Similarly, in the context of the United States, Parsly states that the IRS must "strive to make taxpayers more aware of the available mediation programs, as well as provide more information on the benefits of using ADR." He further claims that: "if the IRS can successfully market a more straightforward package of mediation and other dispute resolution programs, it will go a long way to bolster taxpayer participation and ultimately reap the efficiencies these programs seek to advance.": Parsly D "The Internal Revenue Service and alternative dispute resolution: Moving from infancy to legitimacy" (2007) 8 *Cardozo Journal of Conflict Resolution* 677 at 710.

¹⁰⁸ TINZ was renamed as the Accountants and Tax Agents Institute of New Zealand (ATAINZ) in December 2012.

that the successful adoption and implementation of a tax mediation regime in the New Zealand context would, amongst other things, be dependent on a committed shift by Inland Revenue towards a dispute resolution-focused culture. Having presented the relevant literature for this research, the next chapter now outlines the research methodology and research methods utilised in this study.

Chapter 5

Research Method

5.1 Introduction

This chapter outlines the research methodology and research methods utilised in this study.¹⁰⁹ Specifically, this study adopts a mixed methodological research approach comprising of a quantitative component of a survey questionnaire and a qualitative component of a focus group interview. Section 5.2 of this chapter introduces and provides rationale for the mixed methodological research approach utilised. Section 5.3 outlines the purposive sampling technique employed and the ethical considerations in relation to this study are noted in Section 5.4. Details of the procedures followed in the collection and analysis of data in the quantitative and qualitative components are provided Sections 5.5 and 5.6, respectively. Section 5.7 summarises the chapter.

5.2 Mixed Methodological Approach

Two fundamental methodological approaches have traditionally been used for conducting research: the quantitative approach and the qualitative approach (Creswell, 2003). Set against the background of the “qualitative-quantitative debate” about the relative value of different methods and alternative paradigms, is the recognition of the existence of alternative research methodologies, including mixed methods research (Patton, 2002; McKerchar, 2010). A mixed methodological approach refers to an approach which draws from more than one research approach (that is, quantitative and qualitative) as part of its overall research design (McKerchar, 2010). Such an approach tends to reflect an underlying research framework of

¹⁰⁹ In developing the research methodology and research methods utilised in this study, there was ongoing consultation with academics specialising in the design and conduct of taxation research as well as with researchers and academics experienced in using the focus group method. Their contributions are gratefully acknowledged.

pragmatism whereby the researcher's ontological and epistemological beliefs mean that they seek the "real" reality, or as close to it as possible through choosing the methods, techniques and procedures that best meet the needs and purposes of the research (Creswell, 2003; McKerchar, 2010). Thus, while there are two core research paradigms that guide researchers commonly referred to as "positivism" and "interpretivism",¹¹⁰ pragmatism represents a research framework that lies "in the middle ground" between these two research paradigms (McKerchar, 2010, p 70).¹¹¹

By adopting a mixed methodological approach, "the biases and weaknesses inherent in any single method [can] neutralise or cancel those of other methods" (Creswell, 2003, p.15). McKerchar (2010) also suggests that employing an effective mix of methods can enrich research by maximising the strengths of each method and using the strengths of one method to compensate for the limitations of another. The literature identifies a number of further reasons for adopting a mixed methodological approach. These include: the need to address different objectives of the study which cannot be achieved by a single method; to enable one approach to inform another approach, either in design or interpretation; and to triangulate the findings from multiple approaches (either performed concurrently or sequentially) in an effort to provide greater confidence to the study (McKerchar, 2010). The main challenges presented in utilising a mixed methodological approach are that it involves extensive data collection and that analysing both text and numeric data can be time-intensive. The researcher is also

¹¹⁰ A researcher whose philosophical paradigm is best described as positivist is more likely to adopt a quantitative methodology, whilst an interpretivist researcher could be expected to employ a qualitative methodology: McKerchar M "Philosophical paradigms, inquiry strategies and knowledge claims: Applying the principles of research design and conduct to taxation" (2008) 6 *eJournal of Tax Research* 5 at 7.

¹¹¹ Note that researchers who are guided by a critical realist research paradigm are also associated with employing a mix of research methods. A researcher guided by critical realism sees "greater complexity in the relationships under study and believes that there is a need to go beyond empirical means to find the real truth." Thus, a critical realist will use "at least one empirical method (for example, survey or experiment).": McKerchar M *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, Sydney, 2010) at 168.

required to be familiar with both quantitative and qualitative forms of research (Creswell, 2003).

A mixed methodological approach can be implemented in different ways. The literature identifies two general strategies in integrating the two approaches (quantitative and qualitative) (Creswell, 2003). The implementation may be concurrent, where the quantitative and qualitative phases occur simultaneously during the research study or sequential, in which the researcher starts with gathering qualitative data and then gathers quantitative data, or vice versa, in two distinct phases (Creswell, 2003).

In this study the primary justification for the adoption of a mixed methodological approach by the researcher, is to enable one approach to inform another approach in the interpretation of the findings of the study. Therefore, a sequential mixed methods approach, employing a survey questionnaire (quantitative approach) followed by a focus group interview (qualitative approach),¹¹² has been utilised.¹¹³

¹¹² Additional information in the context of Inland Revenue's current dispute resolution procedures (primarily focusing on facilitated conferences) was also obtained by the researcher through a video conference held with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue, Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013. The researcher's supervisory team also attended. The video conference covered a set of questions provided to Inland Revenue by the researcher prior to the conference (see Appendix 9). As noted earlier (see above n 6), the purpose of the questions for Inland Revenue was in order to provide a contextual background to, as well as clarify the understanding of, certain issues that arose in the findings from the survey questionnaire and the focus group interview. Also, note that feedback from Inland Revenue was not provided on either Jone and Maples' (2012b) proposed tax mediation regime or the refined proposed tax mediation regime.

¹¹³ A mixed methods design using both quantitative and qualitative paradigms has been adopted in previous taxation studies. See, for examples: McKerchar M "The impact of income tax complexity on practitioners in Australia" (2005) 20 Australian Tax Forum 529; Lignier P "Measuring the managerial benefits of tax compliance: A fresh approach" (2009) 24 Australian Tax Forum 117; and Loo EC, McKerchar M and Hansford A "Understanding the compliance behaviour of Malaysian individual taxpayers using a mixed method approach" (2009) 4(1) Journal of the Australasian Tax Teachers Association 181.

5.3 Sample Selection

In this study the sampling technique utilised was purposive non-probability sampling as opposed to random probability sampling.¹¹⁴ Purposive sampling “uses the judgment of an expert in selecting cases or it selects cases with a specific purpose in mind” (Neuman, 2000, p 198). Neuman (2000, p 198) also states that “a researcher may use purposive sampling to select members of a difficult-to-reach [and/or] specialized population.” For the purposes of this study, the specific “cases” of interest consist of practitioners (‘experts’) with specialist knowledge and/or experience in the areas of either tax disputes resolution¹¹⁵ or mediation¹¹⁶ in New Zealand.¹¹⁷ Purposive sampling was used in order to select a sample consisting of 33 tax practitioners (‘tax experts’) and 24 mediation practitioners (‘mediation experts’) from across New Zealand.¹¹⁸

¹¹⁴ Previous taxation studies have utilised the purposive selection of participants. See, for example, McKerchar M and Hansford A “Achieving innovation and global competitiveness through research and development tax incentives: Lessons for Australia from the UK” (2012) 27 Australian Tax Forum 3.

¹¹⁵ Note that the selected tax practitioners were identified as having a significant level of involvement with and/or knowledge on the tax disputes resolution system in New Zealand, as opposed to other tax practitioners who may only have an occasional or infrequent involvement with and/or a less in-depth knowledge of the tax disputes resolution procedures. The tax practitioners included both tax accountants and tax lawyers.

¹¹⁶ As noted above in Chapter 3, Section 3.5.5, given that the mediation profession is not regulated in New Zealand and essentially anyone may hold themselves out to be a mediator, the mediation practitioners utilised in this study were only those identified as being trained and accredited by one (or both) of the two professional organisations of mediators in New Zealand (AMINZ or LEADR). The mediation practitioners selected were practitioners for whom mediation constituted a significant part of their occupations. For example, the practitioners included individuals practising as barristers and mediators, and as mediators, facilitators and trainers. The mediation practitioners selected all had experience in the mediation of commercial disputes.

¹¹⁷ All of the practitioners selected were resident and currently practising in New Zealand with the exception of one tax practitioner who was a former New Zealand tax lawyer currently residing and practising in Australia. This non-resident practitioner was included in the study given that they had been a past member (and convener) of the NZLS Taxation Committee and one of the main authors of the NZLS/NZICA joint submission issued in August 2008 and therefore, had a high level of knowledge on and experience with the New Zealand tax disputes resolution procedures.

¹¹⁸ Given that the NZLS and NZICA are the two main professional bodies involved with the New Zealand tax disputes resolution procedures, lists of presenters at the NZLS Tax Conference 2012 and the NZICA 2012 Tax Conference were used as the primary basis for selecting the sample of tax experts. See New Zealand Law Society *Tax Conference 2012* (New Zealand Law Society, Wellington, 2012) and New Zealand Institute of Chartered Accountants “2012 Tax Conference” (2012) <<http://www.nzica.com>>. The sample of mediation experts was selected from the mediators listed on the AMINZ and LEADR mediation panels who had indicated the mediation of commercial disputes as an area of their mediation practice. The mediation panels of AMINZ and LEADR are provided on their websites: <<http://www.aminz.org.nz>> and <<http://www.leadr.co.nz>>. Recommendations for the selection of mediators from the LEADR panel were also received following a request made by the researcher to the then Chief Executive Officer of LEADR NZ: Personal correspondence with

Although the literature would suggest that the purposive sampling approach is typically associated with qualitative inquiry (Patton, 2002), the quantitative survey questionnaire component of this study also utilises the purposive sampling technique. This is in part due to the absolute population of experts in the tax disputes resolution or mediation fields in New Zealand being unknown. Therefore, “a random and statistically representative sample [which] permits confident generalization from a sample to a larger population” is not possible in this study (Patton, 2002, p 230). The purpose of the survey questionnaire is not to generalise to the larger population of experts in the tax disputes resolution or mediation fields. Rather, the purpose of the survey questionnaire is to provide a preliminary step towards refining the suggested features proposed by Jone and Maples (2012b) for a New Zealand tax mediation regime. The qualitative focus group interview will subsequently explore the survey questionnaire responses in more depth.

Liamputtong (2009) states that, as in most other qualitative methods, the participants in focus groups are not randomly selected and a purposive sampling method is normally employed. The participants are chosen because the researchers believe they will provide the best information to suit the purposes of the investigated issue (Liamputtong, 2009). Borkan, Reis, Hermoni and Biderman (1995, p 978) also state that the purposive sampling method “adds power to qualitative research since it selects ‘information-rich cases’ which can best generate the desired data.” Morgan (1997) further observes that random sampling is seldom used in focus groups for two reasons. First, a small sample is not adequate to represent the whole population. Second, a random sample cannot guarantee that a shared perspective on the issue of investigation will occur and hence participants may not interact well enough to produce

Gabrielle O’Brien, Chief Executive Officer LEADR NZ, Wellington, 11 September 2012. Note that, on 23 May 2013 LEADR NZ and LEADR integrated to become one Australian ADR organisation.

meaningful discussions. The literature also identifies two other methods of non-random sampling that may be used for recruitment to focus groups: “convenience” sampling, where participants who are easily accessible are recruited into the sample and “snowball” sampling, where participants are recruited into the sample based on referral from other participants (Jamieson and Williams, 2003, p 274). In order for the focus group method to be feasibly employed, this study also utilised convenience sampling whereby the five focus group participants were recruited from the Canterbury area of New Zealand only.

5.4 Ethical Considerations

As this study involved human participation, an application for low risk research was reviewed and approved by the University of Canterbury’s Department of Accounting and Information Systems and the University of Canterbury Human Ethics Committee Low Risk process (see Appendix 1).¹¹⁹ This application addressed considerations, including, inter alia, obtaining voluntary, informed consent of participants; maintaining privacy and confidentiality; and participants’ rights to withdraw their participation from the research project at any time. The approval was stated in the covering letter to the survey questionnaire administered to the participants (see Appendix 3).

5.5 Quantitative Component

5.5.1 Survey Questionnaire Administration Method

Surveys are the most widely adopted data-gathering method in the social sciences and related applied fields (McKerchar, 2010). This method generally involves a researcher selecting a

¹¹⁹ The human ethics application covered both the survey questionnaire instrument and the focus group components utilised in this study. Note that, following consultation by the researcher with the University of Canterbury Human Ethics Committee Chair, a human ethics application was not required for the video conference by the researcher with Inland Revenue staff (see above n 112), given the nature and content of the discussion.

sample of people, known as respondents, and administering a standardised questionnaire to them (McKerchar, 2010). Surveys can be conducted by various means, including by telephone, face-to-face interviews or self-administered (Cooper and Schindler, 2006; Sue and Ritter, 2012). The self-administered form of survey was utilised in this current study as it enabled supplementary material which the respondents were required to read prior to completing the survey, to be attached to the survey questionnaire form (see Section 5.5.2 below). Furthermore, Cooper and Schindler (2006) suggest that self-administered surveys may allow respondents more time to think about and answer questions than in telephone surveys or surveys conducted via face-to-face interviews. This was considered to be an important factor in this study given the provision of the aforementioned supplementary reading material to the respondents.

Hair, Money, Samouel and Page (2007) suggest two possible approaches to ensure self-administered surveys reach the targeted respondents, namely, a traditional approach (through post or fax) and electronic delivery (via electronic mail (email) or web-based surveys).¹²⁰ Each approach has its associated advantages and disadvantages. Mail surveys, for instance, have the capacity to reach a large number of geographically dispersed respondents at relatively low cost, although follow-up of non-responses is often difficult (Hair *et al.*, 2007; Sue and Ritter, 2012). Whereas, the main advantages in using surveys administered in electronic form are that they may be less expensive to conduct (for example, the costs of printing and mailing the survey instrument are eliminated) and can facilitate easier data analysis (McKerchar, 2010; Lignier and Evans 2012). Research also suggests that “electronic

¹²⁰ In email surveys, the survey instrument is contained in the main body of the email message or in an email attachment. Web-based surveys are “hosted” on a website. The respondent accesses the survey website either by clicking a hyperlink in an email or in another website, or by typing the web address directly into the address box in the browser window: Schonlau M, Fricker RD and Elliott MN *Conducting Research Surveys via E-mail and the Web* (Rand, Santa Monica, 2002) at 1.

surveys fare better than mail surveys in terms of response speed, or the time required for a survey to be returned” (Kwak and Radler, 2002, p 258). In electronic surveys, the transmission time required to deliver and return a survey is virtually eliminated (Kwak and Radler, 2002). The main disadvantage of electronic surveys is that internet coverage is not universal and that, in populations with internet access, the response rate is lower than with other survey methods (Kaplowitz, Hadlock and Levine, 2004; Lignier and Evans, 2012).

Past studies have generally reported that electronic surveys produce a lower response rate than for mail surveys (Kwak and Radler, 2002; Shih and Fan 2008; McKerchar, 2010).¹²¹ Kaplowitz *et al.* (2004) state that the apparent differences in response rates for electronic surveys and mail surveys may have many causes and explanations. One explanation for the differences in responses rates may be attributed to the fact that traditionally less time and attention has been devoted by researchers to developing and testing motivating tools to increase electronic survey response, compared to the time spent studying tools employed in mail surveys (Kaplowitz *et al.*, 2004).¹²² However, the implementation approaches that are beneficial for mail surveys may not directly translate to response rate benefits for electronic surveys (Couper, 2000). For example, research has identified concerns on the part of potential survey respondents that are particularly salient for internet users, including internet security and the receipt of electronic “junk mail” or “spam” (Sills and Song, 2002, p 26).

¹²¹ For example, Shih and Fan conducted a meta-analysis of 39 studies published between 1998–2006, directly comparing the response rates to web-based surveys and mail-based surveys for samples drawn from the same population. The authors reported a lower mean response rate for web-based surveys (34 per cent) than for mail-based surveys (45 per cent): Shih TH and Fan X “Comparing response rates from web and mail surveys: A meta-analysis” (2008) 20 *Field Methods* 249 at 257. In the context of taxation research, McKerchar’s electronic survey of approximately 20,000 registered tax agents in Australia received a 1 per cent response rate and in comparison, “previous Australian tax studies have reported response rates for mail surveys of between 26 and 50 per cent.”: McKerchar, above n 113, at 538. More recently, Lignier and Evans’ electronic survey of 3,500 small businesses in Australia received a response rate of 4.5 per cent: Lignier P and Evans C “The rise and rise of tax compliance costs for the small business sector in Australia” (2012) 27 *Australian Tax Forum* 615 at 626.

¹²² See, for example, Dillman’s well-developed “Tailored Design Method” which provides a set of inter-connected procedures for conducting mail surveys in order to maximise response rates: Dillman DA *Mail and Internet Surveys: The Tailored Design Method* (2nd ed, John Wiley and Sons, New York, 2000).

Kaplowitz *et al.* (2004, p 94) state that surveys in an “electronic format” have been found to be a useful means of conducting research “for special populations that regularly use the Internet.” Given the purposive selection of the participants in this study and their regular use of email as a means of communication, it was deemed that the survey questionnaire component of this study could be more efficiently administered through an email sent to the selected participants (with the survey questionnaire as an attachment), rather than through the traditional postal route. In addition, administration using an email attachment was chosen over a web-based survey in this current study given that the respondents were initially required to open an email attachment containing the supplementary reading material. Having the survey questionnaire form in the same attachment meant that the questionnaire form was easily accessible and precluded the need for respondents to click on a hyperlink to a separate web page containing the survey questionnaire.¹²³ Couper (2000) notes that technical difficulties with respect to accessing a web survey may also discourage some respondents from completing (or even starting) the survey. For example, “slow modem speeds, unreliable connections, low-end browsers, etc. may inhibit web survey completion” (Couper, 2000, p 474).

5.5.2 Survey Questionnaire Design

Prior to answering the survey questionnaire, all respondents were required to read a seven-page supplementary document¹²⁴ outlining Jone and Maples’ (2012b) proposed New Zealand tax mediation regime. The mediation experts were also required to read an additional five-

¹²³ As noted earlier, (see above n 120), “responding to a web survey is a multistep process: E-mail recipients must first open the contact e-mail, then click on the hyperlink that opens a browser with the survey web page.” In addition, “some aspect of the email must encourage the respondent to click through to the survey.”: Porter SR and Whitcomb ME “Email subject lines and their effect on web survey viewing and response” (2005) 23 Social Science Computer Review 380 at 381.

¹²⁴ Labelled “Researcher’s proposed New Zealand tax mediation regime”. See Appendix 2.

page document¹²⁵ describing the current New Zealand tax disputes resolution procedures prior to reading the aforementioned proposed New Zealand tax mediation regime document (and to completing their survey questionnaires). As the mediation experts came from non-tax backgrounds, the provision of this additional document to this group of respondents was considered necessary in order to initially familiarise the mediation experts with the operation of the current New Zealand tax disputes resolution system and to provide them with a relevant background context to Jone and Maples' (2012b) proposed regime. As stated earlier, these documents were attached preceding the survey questionnaire form (see Appendix 2).

The survey questionnaire consisted of a set of nine closed questions utilising a five-point Likert-scale response format. The questions asked respondents to indicate how much they agreed or disagreed with statements made on specific features of the proposed New Zealand tax mediation regime outlined in the supplementary document provided, by using the response categories: strongly agree; agree; neither agree nor disagree; disagree; and strongly disagree. In addition, one open-ended question was included at the end of the survey questionnaire which asked respondents to provide any additional general comments on the proposed New Zealand tax mediation regime.¹²⁶

5.5.3 Pilot Testing

Pilot testing, also known as pre-testing, is viewed as an iterative process aimed at refining a survey instrument and improving its internal validity – that is, that the findings of the research instrument have not been affected by the instrument itself (Synodinos, 2003;

¹²⁵ Labelled “The current New Zealand tax disputes resolution procedures”. See Appendix 2.

¹²⁶ At the end of the survey questionnaire, in accordance with University of Canterbury Human Ethics Policy requirements, participants were also asked to indicate whether they wished to receive a copy of the research results when they became available at the end of the research.

McKerchar, 2010). Synodinos (2003, p 221) recommends that the survey instrument should be refined based on guidance from repeated pre-tests giving “close attention to the wording of questions, their instructions, their response choices and their sequence.” During this process, “the [survey instrument] may have to be restructured and various items may have to be re-written” (Synodinos, 2003, p 231).

A key feature of structured surveys is standardised questions (Axinn and Pearce, 2006). However, McKerchar (2010, p 141) notes that “even where the wording of questions is standardised, concise and unambiguous, it may still be interpreted differently by the respondents.” Therefore, key considerations as outlined by De Vaus (2002), to be taken into account in the wording of survey questions, were noted by the researcher in order to make the survey instrument as clear, unambiguous and useful as possible (see Table 5.1).

Table 5.1: Guide for the Wording of Survey Questions

<ol style="list-style-type: none"> (1) Is the language simple? (2) Can the question be shortened? (3) Is the question double-barrelled? (4) Is the question leading? (5) Is the question negative? (6) Is the respondent likely to have the necessary knowledge? (7) Will the words have the same meaning for everyone? (8) Is there a prestige bias in the question? (that is, questions to which there is some prestige or notoriety attached.) (9) Is the question ambiguous? (10) Do you need a direct or indirect question? (11) Is the frame of reference for the question sufficiently clear? (12) Does the question artificially create opinions? (13) Is personal or impersonal wording preferable? (14) Is the question wording unnecessarily detailed or objectionable?
--

Source: Adapted from De Vaus (2002, p 97)

The survey instrument (including the two supplementary information documents) in draft form was initially reviewed by an Associate Professor of Taxation Law and a Professor of Taxation experienced in the design and conduct of research. In addition, the supplementary document outlining the New Zealand tax disputes resolution procedures (for the mediation experts selected to be surveyed) was further reviewed by an Associate Professor of Commercial Law (coming from a non-tax background). The survey instrument was then pilot tested using two tax experts and three mediation experts who were not subsequently included as participants in either the final survey questionnaire or the focus group interview.¹²⁷ Based on the feedback obtained, minor changes were made to the wording of the questions and instructions,¹²⁸ and to the presentation of the survey instrument.¹²⁹

5.5.4 Quantitative Data Collection Procedures

Experimental studies indicate that survey pre-notification in web-based surveys has been shown to improve response rates (Hoonakker and Carayon, 2009; Fan and Yan, 2010). In line with these studies, a pre-notification email message was sent to the 57 selected potential participants prior to the survey questionnaire being administered (see Appendix 4).¹³⁰ The message informed the potential participants of the purpose of the survey questionnaire and when to expect it. One week after the sending of the pre-notification email, the survey

¹²⁷ In accordance with Hair, Money, Samouel and Page, the survey questionnaire was pilot tested using a sample of respondents with similar characteristics to the proposed actual respondents. Utilising student proxies to pilot test the survey questionnaire was not deemed appropriate in this study due to the specialist areas of expertise of the proposed actual respondents: Hair JJF, Money AH, Samouel P and Page M *Research Methods for Business* (John Wiley and Sons Ltd, London, 2007) at 201-202.

¹²⁸ Namely, changes were made to the wording of question five of the survey questionnaire (to highlight that examples of certain types of tax disputes to be excluded from mediation were “as outlined in Table 1” of the survey instrument) and the instructions were amended so that respondents were instructed to indicate their answers to the survey questionnaire by placing an ‘X’ in the corresponding boxes on the survey questionnaire form.

¹²⁹ Bullet points were added to the main text in the supplementary information documents, the font size of the text in the tables was increased and the diagrams were enlarged for easier viewing and reading by respondents.

¹³⁰ The sending of the pre-notification email also allowed the researcher to check that the email addresses of the potential participants were correct prior to actual administration of the survey questionnaire.

questionnaires and covering letters were emailed to the selected potential participants as a single attachment in the form of a word document. The covering letter, *inter alia*, reiterated the purpose of the survey questionnaire and provided a guarantee of respondent confidentiality and anonymity.¹³¹ A four week return date was requested. Follow-up reminders (see Appendix 6) were emailed to all non-respondents two weeks after the sending of the survey questionnaire (with duplicate copies of the original questionnaire and covering letter attached to the email) (Bryman and Bell, 2011). A second personalised follow-up reminder was made only to a selected number of the remaining non-respondents at the end of the four week response period.¹³²

Kaplowitz, Lupi, Couper and Thorp (2012, p 346) suggest that the use of “an authoritative, perhaps, familiar sender/subject line can improve response [rates].” Accordingly, all survey questionnaires were emailed from the email address of the researcher’s principal supervisor in order to reduce the likelihood of the survey being regarded as electronic junk mail or spam.¹³³ In addition, the words ‘University of Canterbury’ appeared in the subject line of the emails as Porter and Whitcomb (2005) note that the academic or government sponsorship of a survey may yield a higher response rate. Other strategies employed to increase the response

¹³¹ The covering letter also emphasised that the potential participants had been selected as part of a specialist group of participants due to their particular knowledge and/or experience in the area of either tax disputes resolution or mediation. This is in line with the literature on web surveys which indicates that statements of scarcity have a positive impact on response rates. Porter and Whitcomb suggest that statements indicating that only a selected group have been asked to take part in the survey should elicit higher response rates: Porter SR and Whitcomb ME “The impact of contact type on web survey response rates” (2003) 67 *Public Opinion Quarterly* 579 at 582.

¹³² These selected non-respondents had earlier indicated to the researcher and/or the researcher’s principal supervisor, a willingness to complete the survey questionnaire (via responding to the pre-notification email). As discussed below in Chapter 6, Section 6.2, this second follow-up reminder was made by either a personalised phone call or an email to the selected non-respondents.

¹³³ Given the professional background of the researcher’s principal supervisor, it was considered that it would be more likely that the tax expert participants, in particular, would recognise the email address of the researcher’s principal supervisor as having a greater authoritative status than that of the researcher’s. It was therefore thought that these potential participants would be less likely to disregard the email sent from the supervisor’s email address.

rate to the survey questionnaire, as suggested by the research literature, included: an easy to follow layout, a reasonable length of the survey questionnaire,¹³⁴ and a clearly written covering letter and instructions to participants (Neuman, 2000; McKerchar, 2010).

5.5.5 Descriptive Analysis of Quantitative Data

Descriptive statistics refers to “simple manipulations of data undertaken by researchers to describe basic patterns in the data” (McKerchar, 2010, p 220).¹³⁵ For the purposes of this study the descriptive analysis of quantitative data undertaken consisted of determining the frequency distributions of the responses to the survey questionnaire items. The frequency distributions were determined for the data set pertaining to all of the survey respondents collectively as well as for the data sets pertaining to the tax experts and the mediation experts separately in order to ascertain if there were any notable differences between the responses provided by the two types of experts. The frequency distributions in conjunction with the comments made by the respondents in the survey questionnaire provided a guide as to the possible issues which could be explored in more depth in the subsequent focus group interview.

¹³⁴ Fan and Yan note that past studies have generally found the length of a survey to have a negative linear relation with response rates in both mail and web surveys, although the effect sizes in various studies range from strong to very weak. The variation in the estimated effect sizes is partially due to various measures used in reporting the survey length, including the number of questions, the number of pages, the number of screens, and the time of completing a survey: Fan W and Yan Z “Factors affecting response rates of the web survey: A systematic review” (2010) 26 Computers in Human Behavior 132 at 133. Sue and Ritter provide the following possible classifications of survey length in the context of “online surveys”: “short” (under 20 minutes), “longer” (between 20 and 60 minutes) and “very long” (more than 60 minutes): Sue VM and Ritter LA *Conducting Online Surveys* (2nd ed, Sage Publications, Thousand Oaks, 2012) at 136. In this current study, the reported completion times for the pilot tests ranged from 8-15 minutes for the tax experts and 15-20 minutes for the mediation experts. Using Sue and Ritter’s criteria, the survey length could be classified as “short” for both the tax experts and the mediation experts.

¹³⁵ Note that, given the purpose of this study is not to make inferences on a larger population based on a random sample drawn from it, inferential statistical analysis was not conducted in this study.

5.6 Qualitative Component

5.6.1 Focus Group Interviews

“A focus group is generally understood to be a group of 6-12 participants, with an interviewer or moderator asking questions about a particular topic”¹³⁶ and is usually conducted face-to-face¹³⁷ (Smithson, 2008, p 358). Typically the participants selected for a focus group come from similar social and cultural backgrounds or have similar experiences or concerns (Liamputtong, 2009). Depending on the complexity of the topic and the number of questions to be discussed, a focus group may generally last between one and two hours (Redmond and Curtis, 2009).

The focus group method is used to collect data to help the researcher gain an understanding of specific issues from the perspective of the group’s participants (Liamputtong, 2009). The strength of focus groups is not simply in exploring what people have to say, but in providing insights into the sources of complex behaviours and motivations (Morgan and Krueger, 1993). Group interaction is a unique feature of focus groups which distinguishes the method from individual in-depth interviews (Liamputtong, 2009). It is based on the idea that group processes assist people to explore and clarify their points of view. Morgan (1988, p 12) states that the focus group method “makes explicit use of the group interaction to produce data and

¹³⁶ Smithson notes that in the past focus groups have been used primarily as a market research tool for gathering “quick opinions.” However, they are now being used more widely as a research tool in the social sciences as well as in a wide range of other academic fields. For example, health studies, education, political science and geography: Smithson J “Focus groups” in P Alasuutari, L Bickman and J Brannen (eds) *The Sage Handbook of Social Research Methods* (Sage Publications, Thousand Oaks, 2008) 356 at 358. For examples of the use of focus groups in the context of taxation research, see Coleman C and Freeman L “Cultural foundations of taxpayer attitudes to voluntary compliance” (1997) 13 *Australian Tax Forum* 311 and Woellner R, Coleman C, McKerchar M, Walpole M and Zetler J “Can simplified legal drafting reduce the psychological costs of tax compliance?: An Australian perspective” (2007) *British Tax Review* 717.

¹³⁷ However, Liamputtong states that: “Online focus groups have received increasing popularity in recent years.” This trend stems primarily from “several pragmatic advantages which the Internet can offer.” Some of the advantages of virtual focus groups identified by the research literature include: the reduction in costs and time of research fieldwork, the feasibility of bringing together individuals who are geographically dispersed and the anonymity secured by the research setting: Liamputtong P *Focus Group Methodology: Principles and Practice* (Sage Publications, Thousand Oaks, 2011) at 13.

insights that would be less accessible without the interaction found in a group.” This group interaction has also been termed “the group effect” (Carey, 1994; Carey and Smith, 1994). Focus groups allow participants to react and build on the responses of other group members. This synergistic effect of the group setting can result in the production of data or ideas that might not have been uncovered in individual interviews. Differences in opinion among group members can also help researchers to identify how and why individuals embrace or reject particular ideas (Stewart, Shamdasani and Rook, 2007).

Focus groups allow the researcher to interact directly with participants. This provides opportunities for the clarification of responses, for follow-up questions and for the probing of responses. In addition the researcher can observe non-verbal responses which may carry information that supplements (or even contradicts) participants’ verbal responses (Stewart *et al.*, 2007). Stewart *et al.* (2007, p 42) argue that “the open response format of a focus group provides an opportunity to obtain large and rich amounts of data in the respondents’ own words.” The researcher can “obtain deeper levels of meaning, make important connections and identify subtle nuances in expression and meaning” (Stewart *et al.*, 2007, p 42). Given the foregoing rationale, the focus group method has been utilised in this study as opposed to conducting individual in-depth interviews with the selected tax disputes resolution and mediation experts. Given that the purpose of this study was to refine Jone and Maples’ (2012b) proposed tax mediation regime, the focus group interview method was also selected over individual in-depth interviews as the method allowed for a greater development and refinement of ideas without necessarily having to return to participants to conduct repeat individual interview sessions.¹³⁸

¹³⁸ The focus group method was also chosen due to the possibility that the interview participants may have perceived the individual interview context as being too overwhelming and/or time-consuming and this could have consequently impacted on the quality of the responses provided. Liamputtong states that: “Focus group

Although, focus groups can provide data from a group of people much more quickly and often at less cost than would be the case if each individual were interviewed separately, the literature also identifies a number of limitations of focus groups (Stewart *et al.*, 2007; Liamputtong, 2009). The information gathered from a focus group can only represent the perspective of the participants included (Liamputtong, 2009). “The small numbers of respondents that participate ... and the convenience nature of most focus group recruiting practices significantly limit generalization to a larger population” (Stewart *et al.*, 2007, p 43). The interaction of respondents with one another and with the moderator can also produce “demand effects” (Stewart *et al.*, 2007, p165). The responses from members of the group are not independent of one another and “some participants may conform to the responses of other group members even though they may not agree” (Liamputtong, 2009, p 84). Focus group discussions may also be sidetracked or dominated by one or more vocal individuals (Smithson, 2008). Rothengatter (2005, p 289) further states that some focus group participants “may remain silent in fear of formal repercussions or the strength of informal social controls within their network (e.g. a code/conspiracy to silence, loss of trust, or public ridicule).” As focus group discussions are directed by a moderator, there is a risk that an inexperienced or biased moderator may provide cues about what types of responses are desirable or seek to achieve group consensus on particular issues (Stewart *et al.*, 2007).

As a research method, there are three different ways in which focus groups can be used: they can be used as a “self-contained” method, where they serve as the primary source of data collection; they can be used as a “supplementary” source of data, where information from them is most often used as a source of preliminary data in quantitative research; or they can

discussions are more akin to natural social interaction among participants. Thus the environment among participants may be more comfortable and enjoyable for research participants.”: *ibid.*, at 3-4.

be used in “multimethod” studies, where a combination of several approaches is used to collect information (Liamputtong, 2009, p 68). The main purpose of the multimethod research strategy is “the ‘mutual enhancement’ of the understanding of each method by the other” (Liamputtong, 2009, p 69). The focus group literature indicates that in empirical studies where the focus group method has been used in combination with other research methods, the most frequent pairings were either in individual in-depth interviews or surveys (Morgan, 1996). In this present study the focus group method will be used in combination with a survey questionnaire. The focus group will act as a “follow-up” that assists in interpreting the survey results (Morgan, 1996, p 135).

5.6.2 Focus Group Sample Selection

The focus group participants comprised of respondents to the survey questionnaire from the Canterbury region of New Zealand who had voluntarily expressed their willingness to participate in the focus group session by completing the consent form emailed with the survey questionnaires (see Appendix 7). The final focus group comprised of four tax experts (two tax accountants and two tax lawyers) and one mediation expert.¹³⁹

5.6.3 Focus Group Composition

As the emphasis in focus groups is on group discussion, the composition of the group plays a major role in the interaction process (Liamputtong, 2009; Krueger and Casey, 2009). Conventionally, it is argued that participants should have something in common so that maximum interaction within the group can be achieved and individuals dominating or

¹³⁹ It is acknowledged that the specific composition of the focus group (that is, the necessity of having to recruit all of the focus group participants from the Canterbury region and that only one mediation expert was available to participate) would have influenced the dynamics of (and therefore, the findings from) the focus group. Further limitations with respect to the focus group composition and size as well as the number of focus groups utilised, are discussed below in Sections 5.6.3-5.6.5 and Section 9.5.1.

withdrawing can be avoided (Liamputtong, 2009). Liamputtong (2009, p 71) states that it is “usually argued that if the participants come from similar social and cultural backgrounds, they may feel more comfortable talking to each other and also more likely to talk openly.” Morgan (1997, p 35) claims that it is this social and cultural homogeneity that allows for more “free-flowing conversations” among the participants. Social and cultural backgrounds can include factors such as age, gender, religion, socio-economic background, educational background, occupation, status within the community and ethnicity (Liamputtong, 2009).

However, some researchers argue that heterogeneous group compositions can sometimes work favourably (Litoselliti, 2003; Hennink, 2007), particularly if researchers want to “maximize the possibility of exploring subjects from different perspectives” (Kitzinger, 1995, p 300). Smithson (2008, p 358) also claims that “heterogeneous groups can produce some very interesting discussions.” Krueger and Casey (2009, p 66) state that focus groups should be “characterized by homogeneity, but with sufficient variation among participants to allow for contrasting opinions.”

Often the participants in a focus group are not known to each other or to the moderator or the researcher (McKerchar, 2010). This practice is derived from focus groups conventionally employed in market research (Liamputtong, 2011). The lack of in-depth knowledge about each other can give participants more freedom to express their views to the group and to listen to what others have to say without feeling judged or apprehensive about how their future relationship may be affected (McKerchar, 2010). However, Liamputtong (2009, p 72) states that “there are many situations, though, when using strangers is not permissible or practical.” Social science researchers often conduct focus groups “in organisations and other naturally occurring groups in which acquaintanceship is unavoidable” (Morgan, 1997, p 38).

Morgan (1997) further notes that acquaintances are more likely to possess tacit knowledge about one another that allows them to communicate without articulating assumptions and context.

In this current study, the participants in the focus group shared a common characteristic with respect to having a relevant interest and insight in Jone and Maples' (2012b) proposed New Zealand tax mediation regime. However, the participants differed in terms of their areas of knowledge and expertise.¹⁴⁰ The variation in the occupations of the participants enabled insights from different perspectives and encouraged a more dynamic group discussion (Kitzinger, 1995; Krueger and Casey, 2009). Due to the specialist nature of the participants' areas of expertise and the restricted geographical area from which the participants were recruited from, it was inevitable that some of the participants (namely, the tax expert participants) in the focus group were known to each other. However, these associations were primarily at a professional level.¹⁴¹ The participants were not previously known to the researcher.

5.6.4 Focus Group Size

Krueger and Casey (2009) state that the traditionally recommended size of a focus group within the context of marketing research is 10 to 12 people. However, they further recommend that the "ideal size" of a focus group in most other contexts is five to eight

¹⁴⁰ As stated earlier, the focus group participants comprised of tax experts (tax accountants and tax lawyers) and a mediation expert. Due to the limited number of available participants, conducting homogeneous focus groups consisting of separate groups of tax and mediation experts, respectively, was not feasible in this current study.

¹⁴¹ Due to the particular professional background of the moderator utilised in this study (see Section 5.6.6.1 below), some of the focus group participants (that is, the tax experts) were also known to the moderator. However, given that the nature of these connections were at a professional level, they were deemed to have a negligible impact on the way in which the participants interacted with the moderator and the responses which they provided.

participants (Krueger and Casey, 2009, p 67).¹⁴² Krueger and Casey (2009, p 67) argue that focus groups with large groups of more than 10 participants can be “difficult to control and they limit each person’s opportunity to share insights and observations.” In addition, group dynamics can change when participants want to but are not able to describe their experiences (Krueger and Casey, 2009). Krueger and Casey (2009) note that small focus groups, or mini-focus groups, with four to six participants are becoming increasingly popular because the smaller groups are easier to recruit and host and are more comfortable for participants. The disadvantage of the mini-focus group is that it limits the total range of experiences because the group is smaller.

Krueger and Casey (2009, p 68) outline the following factors which should be considered when deciding how many people to recruit to a focus group:

- The purpose of the study: If the purpose of the study is to understand an issue or behaviour, invite fewer people. If the purpose is to pilot-test an idea or materials, invite more people.
- The complexity of the topic: More complex, invite fewer people.
- Participants’ level of experience or expertise: More experience, invite fewer people.
- Participants’ level of passion about the topic: More passionate, invite fewer people.
- The number of questions you want to cover: More questions, invite fewer people.

In this current study, one of the purposes of the focus group session was to understand the responses to the survey questionnaire in greater detail and to elicit a rich source of data. The

¹⁴² For example, in the context of taxation research, Woellner, Coleman, McKerchar, Walpole and Zetler utilised a focus group comprising of six tax practitioners: Woellner, Coleman, McKerchar, Walpole and Zetler, above n 136, at 724.

topic of the study was considered to be of a complex and specialist nature. The focus group participants selected possessed a high level of experience and/or expertise and were considered to be passionate about the topic being discussed. In addition, it was expected that a reasonable number of questions would be covered during the focus group session (see Section 5.6.7 below). Considering these factors and consistent with Krueger and Casey's (2009, p 67) recommendation of "five to eight participants", the final focus group comprised of five participants. This is also in line with the literature which suggests that larger groups are potentially more difficult to moderate (and subsequently analyse), especially when the participants are "highly involved in the topic" (Morgan, 1997, p 42).

5.6.5 Number of Groups

Stewart *et al.* (2007, p 58) state that "there are no general rules concerning the optimal number of groups." When the research is complex or when numerous different types of individuals are of interest, more focus groups will be required. Morgan (1997, p 44) states that research projects that comprise more heterogeneous participants typically require more groups as "the diversity in participants often makes it more difficult to sort out coherent sets of opinions and experiences." Morgan (1997, p 44) further states that it is implicit in the criterion of saturation (that is, the point at which additional data collection no longer generates new understanding), that it is "necessary to compare the discussions from several groups in order to determine whether participants are repeating what was said in earlier groups." This criterion is typically applied to focus groups used within the market research context (Morgan, 1996). The question of the number of groups to use is ultimately one that must be determined based on the objectives of the research (Stewart *et al.*, 2007). However, the researcher needs to take into account limitations of time, budget and personnel (Liamputtong, 2009; McKerchar, 2010).

As previously noted, given the time and resource constraints associated with this study and the limited number of available and willing participants in the Canterbury region, only one focus group was able to be utilised in this study. While it is acknowledged that utilising only one group can present limitations to the data obtained (Morgan, 1997; Barbour, 2007),¹⁴³ it is not the purpose of this study to collect data from focus group sessions until saturation point has been achieved. In addition, as noted earlier, it is not the purpose of this study to draw generalisations to a larger population. Rather, the objective is to inform and enrich the understanding of the survey questionnaire findings and gain an in-depth understanding of the perspectives of the selected focus group participants (Barbour, 2007; Kruger and Casey 2009).¹⁴⁴

5.6.6 The Research Team

The focus group literature indicates that, regarding the research team, “there are at least two members who are crucial for the running of a focus group: the moderator and the note-taker [who is usually the assistant moderator]” (Liamputtong, 2011, p 60). The moderator facilitates the focus group discussion. The assistant moderator takes extensive notes, operates the tape-recorder (voice recorder) and handles the environmental conditions and logistics of the focus group (Krueger and Casey, 2009).

¹⁴³ For example, Morgan states that when collecting data from one or two groups it may be “impossible to tell when the discussion reflects either the unusual composition of that group or the dynamics of that unique set of participants.”: Morgan DL *Focus Groups as Qualitative Research* (Sage Publications, Thousand Oaks, 1997) at 44.

¹⁴⁴ For example, in a study undertaken by Taylor, Kuo and Sullivan, a sub-set of eight questionnaire participants were invited to a focus group interview to discuss the findings of the questionnaire. See Taylor AF, Kuo FF and Sullivan SF “Coping with ADD: The surprising connection to green play settings” (2001) 33 *Environment and Behavior* 54 at 63. In the context of taxation research, as noted earlier, Woellner, Coleman, McKerchar, Walpole and Zetler utilised a single focus group comprising of six tax practitioners who had all undertaken the same problem-solving activity prior to the focus group. The focus group was, inter alia, aimed at exploring the practitioners’ reactions to the problem-solving activity: Woellner, Coleman, McKerchar, Walpole and Zetler, above n 136, at 724.

5.6.6.1 The Moderator

The moderator is a key player in a focus group session and has a significant influence on the collection of rich and valid information (Stewart *et al.*, 2007; Krueger and Casey, 2009; Liangputtong, 2009). The moderator may or may not be the principal researcher (Smithson, 2008; Krueger and Casey, 2009). Although, Carey (1994) states that the researcher is not always the best person to act as the moderator, as they may not have the necessary skills.¹⁴⁵ Some researchers choose to utilise the services of a professional moderator to run the focus group. One advantage of this approach is that it frees up the researcher to better observe the group interaction (McKerchar, 2010). However, there is a risk in that if the professional moderator is not well briefed, some opportunities for further exploration that arise during the focus group may not be recognised (McKerchar, 2010). The moderator needs to be skillful in guiding the focus group and engaging all participants. The moderator needs to know “when to probe and who to probe; when to let the group run itself; and when to take back control and move the interview forward” (McKerchar, 2010, p 164). Liangputtong (2009, p 77) provides a summary of the characteristics of a “good moderator.” These are outlined in Table 5.2 below.

¹⁴⁵ Krueger and Casey state that in the market research context moderators tend to be specifically trained and employed to perform the moderating task, while in the context of academic research, moderators are usually “faculty, graduate students or qualified staff”: Krueger RA and Casey MA *Focus Groups: A Practical Guide for Applied Research* (4th ed, Sage Publications, Thousand Oaks, 2009) at 151.

Table 5.2: Characteristics of a Good Moderator

A moderator needs to:

- Be sensitive to the needs of the participants
- Be non-judgmental about the responses from the participants
- Respect the participants
- Be open-minded
- Have adequate knowledge about the project
- Have good listening skills
- Have good leadership skills
- Have good observation skills
- Have patience and flexibility

Source: Liamputtong (2009, p 77)

In this current study, a neutral faculty member¹⁴⁶ from the Department of Accounting and Information Systems at the University of Canterbury acted as the focus group moderator. This was partly in order to minimise the potential effects of bias from the researcher (and the researcher's supervisory team) on the focus group discussion due to their direct involvement in the study (Greenbaum, 1991; Litoselliti, 2003). It also allowed the researcher to fully observe the focus group session and take extensive notes (McLafferty, 2004; McKerchar, 2010). The moderator was a Professor of Taxation who had prior experience in facilitating the NZICA Professional Accounting School (PAS) programme workshops.

The moderator must also have adequate background knowledge on the topic of discussion in order to place comments in perspective and follow up on key issues that might arise (Shoaf, 2003; Krueger and Casey, 2009). Greenbaum (1998, p 78) further suggests that:

¹⁴⁶ The moderator was a faculty member who was not part of the researcher's supervisory team. The use of a "neutral faculty member" as the moderator has regularly been used in other focus group studies in the academic context. For examples, see Connaway LS, Johnson DW and Searing SE "Online catalogs from the users' perspective: The use of focus group interviews" (1997) 58 College and Research Libraries 403; and Young NJ and Von Seggern M "General information seeking in changing times: A focus group study" (2001) 41 Reference and User Services Quarterly 159.

It is not essential, but it is almost always an advantage when a moderator has had some prior experience working in the industry ... about which the research is being conducted.

In this current study, the moderator possessed a high level of tax and legal knowledge and had substantial experience in both the accounting and legal professions.¹⁴⁷ This background was deemed beneficial given the specialist nature of the topic under study and in that it was possible for the moderator to “make explicit use of their own experience to encourage discussion” in the focus group session (Smithson, 2008, p 361).¹⁴⁸

Pre-focus group preparation material was provided to the moderator in the form of the focus group questioning route (see Section 5.6.7 below) and the information documents on the current New Zealand tax disputes resolution procedures and Jone and Maples’ (2012b) proposed New Zealand tax mediation regime. Following Stewart *et al.* (2007, p 82), the moderator was briefed with respect to the objectives of the research and the respective priorities of the questions contained in the questioning route.

5.6.6.2 Note-taker (Assistant Moderator)

A note-taker is also essential in focus groups as the moderator often is not able to lead the discussion, observe, and take notes at the same time (Krueger and Casey, 2009; Liamputtong, 2009). The note-taker records key issues emerging in the session and other factors that may be important in the analysis of the results. The note-taker writes down the participants’

¹⁴⁷ The moderator was a chartered accountant and a barrister and solicitor of the High Court of New Zealand.

¹⁴⁸ In addition, the focus group literature suggests that ideally the moderator should share some of the participants’ characteristics, such as their gender, race, age, language, social or economic characteristics and technical knowledge. Barrett and Kirk suggest that “participants would feel most comfortable with a moderator that they perceive as similar to them”: Barrett J and Kirk S “Running focus groups with elderly and disabled elderly participants” (2000) 31 *Applied Ergonomics* 621 at 624. In this current study, the moderator shared some similar characteristics such as language and technical knowledge to most of the focus group participants.

responses as well as recording non-verbal responses that may assist in interpreting how participants feel about particular issues (Liamputtong, 2009). The note-taker also assists the moderator by checking if any key issues have been overlooked (Hennink, 2007). Commonly, towards the end of the focus group session, the moderator will ask the note-taker if there are any issues which have not been discussed or if there are any extra questions to be discussed (Liamputtong, 2011). Note-takers do not participate in the group discussion and usually sit outside the discussion circle to take notes unobtrusively (Liamputtong, 2011).

In this current study, the researcher filled the role of the note-taker (and assistant moderator). It is also common for focus groups to be observed by others (Stewart *et al.*, 2007). Stewart *et al.* (2007, p 93) state that “there is seldom reason to believe that observation ... radically alters responses of members in a focus group.” The role of the observer is “to listen and take notes that can facilitate the research process, not to judge or assess what will be discussed” (Litoselliti, 2003, p 69). The researcher’s principal and secondary supervisors were both present as observers (and to take notes) of the focus group discussion.¹⁴⁹

5.6.7 Focus Group Questioning Route

The focus group questioning route outlines the series of questions to be used in a focus group session. The questioning route “contains the main issues and usually, the wording of the questions that the moderator will be using in a session” (Liamputtong, 2011, p 75). The focus group literature suggests that a good questioning route should be sequenced so that the conversation naturally flows from one question to another and structured so that questions are ordered from the more general to the more specific (Stewart *et al.*, 2007; Krueger and Casey,

¹⁴⁹ Note that in this study the researcher (as well as her supervisors) had the ability to communicate with the moderator at points during the focus group session where they felt that it was necessary to ensure that key issues contained in the questioning route were addressed or in order to raise additional issues.

2009). Focus group questions can be of several types, each with their own distinctive purpose. Krueger and Casey (2009, p 38) identify five general categories of questions that may be used in focus group sessions: opening, introductory, transition, key and ending. These question categories are typically presented in the order outlined below.

- (1) Opening questions: The first round of questions allows a quick answer (usually 10 to 20 seconds) and it enables identification of characteristics that the participants have in common. The opening question is not a discussion question and typically is not analysed. The intent of the question is not to get information but to get everyone in the group talking early on.
- (2) Introductory questions: Introductory questions introduce the general topic of discussion and they provide the participants an opportunity to think about their connection with the topic.
- (3) Transition questions: Transition questions move the discussion toward the key questions. They serve as a link between the introductory questions and the key questions.
- (4) Key questions: Key questions drive the study and require the greatest attention in the analysis. The moderator needs to allow sufficient time for a full discussion of the key questions. Furthermore, it is likely that the moderator will need to use probes more frequently with key questions.
- (5) Ending questions: Ending questions bring closure to the discussion. They allow the participants to consider all of the comments shared in the discussion and to identify which aspects are most important or most in need of action.

A questioning route for the focus group session (see Appendix 8) was developed using Krueger and Casey's (2009) five categories of questions as a guide.¹⁵⁰ The questioning route was semi-structured and consisted of open-ended questions along with suggestions for appropriate probes so that more in-depth explanations and meanings could be obtained from participants.¹⁵¹ The questioning route was reviewed in draft form by an Associate Professor of Taxation Law and refined to take into account the feedback obtained.¹⁵² As stated earlier, the questioning route was discussed with the moderator prior to the conducting of the focus group session.¹⁵³

5.6.8 Recording of Focus Group Discussions

Focus group discussions are generally recorded in two ways (Liamputtong, 2009). First, as outlined in Section 5.6.6.2, the note-taker records information in the form of written notes. Second, the discussions are recorded by a voice recorder as typically, the note-taker will not be able to record everything that is discussed (Liamputtong, 2009).¹⁵⁴ The recorded discussions are later transcribed for data analysis. Participants need to be fully aware of the presence of the voice recorder and the researcher needs to obtain permission from the participants before the focus group commences (Liamputtong, 2009). In this current study,

¹⁵⁰ Note that in this study, the introductory and transition question categories were merged in order to allow sufficient time and emphasis on the key question category.

¹⁵¹ The questioning route was intended to be flexible so that the moderator had the discretion to probe more deeply where necessary and to skip over areas in the questioning route that had already been covered.

¹⁵² Namely, the original number of questions in the questioning route was reduced in order to focus on the key question category. Possible additional questions that could be asked by the moderator if time permitted were placed at the end of the questioning route.

¹⁵³ For the purposes of this study, a pilot test of the questioning route in a focus group session was not deemed feasible given the small number of participants (in the Canterbury region) which were potentially available for the actual focus group.

¹⁵⁴ The focus group literature also notes that video recording can be used as an alternative to voice recording. However, a key difference between voice recording and video recording is the greater level of intrusiveness present with a video record and the resulting potential effect on participant spontaneity: Morgan, above n 143, at 56.

permission to voice record the focus group discussion was obtained through the consent forms completed by the focus group participants (see Appendix 7).

5.6.9 Length of Focus Group Sessions

Liamputtong (2009) states that, generally, a focus group should not last longer than two hours and most focus group sessions are conducted within one and a half hours. However, depending on the participants, they can sometimes go on for three hours (Liamputtong, 2009). Liamputtong (2009) provides a number of reasons for why a focus group session should not take too long, including: the participants may find the discussion too tiring; some participants may run out of ideas to contribute and hence find the discussion boring; or the participants may have other commitments to return to such as childcare or work. In this current study, the length of time allocated for the focus group session was one and a half hours.

5.6.10 Conduct of the Focus Group

The focus group session was conducted subsequent to the respondents' completion of the survey questionnaire. The respondents in the Canterbury area who had indicated their consent to participating in the focus group session on the returned consent forms were contacted by email to arrange the date, time and location of the focus group.¹⁵⁵ The focus group session was held at the University of Canterbury's Law School Staff Library.¹⁵⁶

¹⁵⁵ The focus group participants were also emailed with a reminder of the focus group session and directions to the focus group venue three days prior to the scheduled focus group session.

¹⁵⁶ Krueger and Casey note that, while market research focus groups are typically held in rooms with one-way mirrors (that hide unknown viewers), such facilities when used in focus groups in "academic environments" may be intimidating and limit participant discussion: Krueger and Casey, above n 145, at 146. The University of Canterbury's Law School Staff Library was considered by the researcher to be a comfortable and non-intimidating setting for the focus group participants, with minimal distractions.

All focus group participants were invited to attend an informal meeting session half an hour preceding the focus group session at which complimentary food and beverage was provided. The main purpose of this “pre-discussion” session was to “make the participants feel welcome and comfortable” and foster informal conversation amongst the group (Liamputtong, 2011, p 72).

During the focus group session, the participants were seated around a table with the moderator in a circular arrangement in order to enable all group members to have equal access to each other (Hennink, 2007). The participants were provided with name tags to assist the moderator in facilitating the discussion and “to provide a basis for building greater rapport among group members” (Stewart *et al.*, 2007, p 90). Two voice recorders were placed on the table to record the focus group discussion.¹⁵⁷

At the commencement of the focus group, the moderator followed the recommended introductory procedures outlined by Krueger and Casey (2009, p 96):

- (1) Welcome everyone.
- (2) Give an overview of the topic.
- (3) Provide any ground rules for the discussion.¹⁵⁸
- (4) Ask the opening question.¹⁵⁹

¹⁵⁷ Two voice recorders were used as a precaution against the possible malfunctioning of the voice recording equipment.

¹⁵⁸ For example, all comments are welcome, there are no right or wrong answers and all comments are to remain confidential. The focus group participants are also informed that the session is being recorded. See Krueger and Casey, above n 145, at 96.

¹⁵⁹ As noted above in Section 5.6.7, the opening question acts as an invitation to the participants to introduce themselves. It also acts to assist the transcriber in differentiating between the voices in the discussion: Hennink *MM International Focus Group Research: A Handbook for Health and Social Sciences* (Cambridge University Press, Cambridge, 2007) at 174.

The introductory stage of the focus group acted to establish “a nonthreatening and nonevaluative environment”, thus allowing the moderator to lead the discussion to cover the more specific questions contained in the questioning route within the time limit of the focus group session (Stewart *et al.*, 2007, p 89). The participants were given the opportunity to make additional comments or raise any other issues that they had at the end of the focus group session.

To conclude the focus group session, the participants were thanked for their participation and a brief explanation was given by the moderator regarding the use of the data supplied by the participants.¹⁶⁰ Immediately following the focus group, the moderator, assistant moderator and the observers undertook a debriefing session (Barbour, 2007; Krueger and Casey, 2009).¹⁶¹ Immediate observations about the focus group discussion were recorded, noting salient features of group dynamics and insights gained with respect to the topics that most engaged participants.

A complete transcription¹⁶² of the focus group session was carried out by the researcher soon after the completion of the focus group to minimise recall loss (Quine, 1998; Krueger and Casey, 2009).¹⁶³ The transcription process involved listening to the recorded voice file and

¹⁶⁰ The participants were again informed of the procedures that would be taken by the researcher to ensure participants’ anonymity and confidentiality (as previously outlined in the covering letter). In accordance with the University of Canterbury Human Ethics Policy requirements, participants were offered the opportunity to receive a summary of the focus group findings when they became available at the end of the research.

¹⁶¹ The debriefing session was also voice recorded and transcribed, and used to complement the focus group analysis (see Section 5.6.11 below).

¹⁶² Bertrand, Brown and Ward recommend utilising the complete transcription approach when: (a) the necessary financial and human resources are available; (b) the transcriptions can be produced in a reasonable amount of time; and (c) the purpose is to obtain accurate, detailed information: Bertrand JT, Brown JE and Ward VM “Techniques for analyzing focus group data” (1992) 16 Evaluation Review 198 at 201.

¹⁶³ The transcription of the focus group session was carried out by the researcher as opposed to utilising an external transcriber as it enabled the researcher to develop a more thorough understanding of the data through having transcribed it. The process of transcription also acted to “facilitate the close reading and interpretative

writing a verbatim record of everything that was said (Bertrand, Brown and Ward, 1992). The full transcript was then reviewed for accuracy and completeness by checking the transcript back against the voice file (Hennick, 2007).

5.6.11 Qualitative Data Analysis

The literature identifies several alternative qualitative analysis techniques that can be used to analyse focus group data (Bertrand *et al.*, 1992; Onwuegbuzie, Dickinson, Leech and Zoran, 2009).¹⁶⁴ Krueger and Casey (2001, p 15) identify four different types of focus group data analysis based on the different forms of data that can be captured for analysis (see Table 5.3). Each type of analysis provides a different level of specificity, detail and completeness. Given that transcript-based analysis provides the greatest level of detail and perceived level of rigor, this form of analysis was employed for the purposes of this study. Transcript-based analysis uses complete transcripts of the focus groups as a basis for analysis. These are often supplemented with field notes taken by the researchers and moderator debriefings (Krueger and Casey, 2009).

skills required to analyse the data.”: Lapadat JC and Lindsay AC “Transcription in research and practice: From standardization of technique to interpretive positionings” (1999) 5 Qualitative Inquiry 64 at 82.

¹⁶⁴ For example, some of the qualitative data analysis techniques which lend themselves to focus group data analysis are constant comparison analysis, classical content analysis, keywords-in-context, and discourse analysis: Onwuegbuzie AJ, Dickinson WB, Leech NL and Zoran AG “A qualitative framework for collecting and analyzing data in focus group research” (2009) 8(3) International Journal of Qualitative Methods 1 at 5.

Table 5.3: Focus Group Data Analysis Types

Analysis type	Memory-based analysis	Note-based analysis	Tape-based analysis	Transcript-based analysis
Description	Moderator analyses based on memory and past experiences and gives an oral debriefing report to client.	Moderator prepares a brief written description based on summary comments, field notes and selective review of tapes.	Moderator prepares written report based on an abridged transcript after listening to tapes, and consulting field notes and moderator debriefing.	Analyst prepares written report based on complete transcript. Some use of field notes and moderator debriefing.
Oral and/or written reports	Usually oral report only.	Usually oral and written report.	Usually oral and written report	Usually oral and written report.
Time required per group	Very fast: Within minutes following the discussion.	Fast: Within 1-3 hours per group.	Fast: Within 4-6 hours per group.	Slow: About 2 days per group.
Perceived level of rigor	Minimal.	Moderate.	Moderate to High.	High.
Risk of error	High.	Moderate (depends on quality of field notes).	Low.	Low.

Source: Krueger and Casey (2001, p 15)

Krueger and Casey (2009, p 118) further outline the “classic analysis strategy,”¹⁶⁵ a systematic form of transcript-based analysis commonly used in focus group research.¹⁶⁶ The objective of the classic analysis strategy is to enable the analyst to “identify patterns in the data and discover relationships between ideas or concepts” (Krueger and Casey, 2009, p 125). The approach is derived from Glaser and Strauss’ (1967) constant comparative method of

¹⁶⁵ The classic analysis strategy is also known as the “cut-and-paste” or “scissor-and-sort” technique. See Stewart DW, Shamdasani PN and Rook DW *Focus Groups: Theory and Practice* (2nd ed, Sage Publications, Thousand Oaks, 2007) at 116.

¹⁶⁶ The classic analysis strategy was recommended as appropriate for use in this current study following personal correspondence with Dr Richard A Kruger, Professor Emeritus and Senior Fellow, University of Minnesota, specialising in focus group interviewing, program evaluation, applied research methodology and qualitative analysis, and co-author of *Focus Groups: A Practical Guide for Applied Research* (see Krueger and Casey, above n 145) on 28 August 2012. The classic analysis strategy was also utilised as it meets the four critical qualities of focus group analysis identified by the literature. That is, the analysis must be “systematic, verifiable, sequential and continuous.” For further information on these qualities, see *ibid*, at 115.

qualitative analysis¹⁶⁷ which “engages investigators in an intense, systematic process of examining and reexamining the data while comparing one source with another to identify similarities and differences” (Yamagata-Lynch, 2010, p 73). Glaser (1965, p 439) describes the constant comparative method as following four key stages:

- (1) comparing incidents applicable to each category;
- (2) integrating categories and their properties;
- (3) delimiting the theory; and
- (4) writing the theory.

It follows that the constant comparison of segments of data with emerging categories also underpins the steps in Krueger and Casey’s (2009) classic analysis strategy (as outlined in Table 5.4). However, it should be noted that, for the purposes of this study Krueger and Casey’s (2009) classic analysis strategy was used to analyse the data for only the single focus group conducted, as distinct from analysing the results of multiple focus groups as indicated in Table 5.4. Nevertheless, the same general principles underlying the analysis apply.

¹⁶⁷ Constant comparison analysis was first used in grounded theory research. However, the literature suggests that constant comparison analysis can be used to analyse many types of data, including focus group data. For further information on the constant comparative method, see Glaser BG and Strauss AL *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine De Gruyter, New York, 1967).

Table 5.4: Classic Analysis Strategy

<p>(1) Prepare your transcripts for analysis. Be sure they follow a consistent style. For example, single-space comments and double-space between speakers. The moderator's comments should be easily identifiable by bolding, capitalising, or underlining.</p>
<p>(2) Make two copies of each transcript. One will be used to cut up and the other one stays intact for later reference. Consider printing transcripts on different colours of paper and colour-coding by participant type or category. Develop a strategy for documenting the source of a quote. Later you may want to go back and examine the context of a particular discussion and the source of the information will be vital. For example, you might use different colours of highlighter marking pens and use a specific colour for each category of respondents. Or, you could use a code number for each category of respondent and place that code number at the end of every quote in the transcript.</p>
<p>(3) Arrange transcripts in an order. The order could be in the sequence in which the groups were conducted, but more likely it will be by categories of participants or by some demographic screening characteristics of participants. This arrangement helps to alert the analyst to changes that may be occurring from one group to another.</p>
<p>(4) Read all transcripts in one sitting. This quick reading is to remind the analyst of the whole scope of the focus groups and to refresh the analyst's memory of where information is located, what information is missing, and what information occurs in abundance.</p>
<p>(5) Prepare large sheets of paper. Use a large sheet of paper for each question (sometimes several questions are integrated together into a theme). Place the large sheets on chart stands, on a long table or on the floor. Identify the question or theme at the top of the sheet. If there are several categories of participants the analyst may draw lines to divide the paper into sections and then group comments within these sections.</p>
<p>(6) Cut and tape. Read responses to the same question from all focus groups. Cut out relevant quotes and tape them to the appropriate place on the large sheet of paper. Look for quotes that are descriptive and capture the essence of the conversation. Sometimes there will be several different points of view and you can cluster the quotes around these points of view. The quality and relevance of quotes will vary. In some groups you might find that you can use almost all quotes, but in other groups there will be few useable quotes. Set the unused quotes aside for later consideration. If a participant's comments are really addressing another question, tape the comment under the question it addresses.</p>
<p>(7) Move similar quotes into categories or 'piles'. As the analyst reads each quote, he or she needs to reflect on whether it is similar to or different from other quotes already assembled and put similar quotes together. If a quote raises different issues or ideas, then create a new category and a separate pile for this information.</p>
<p>(8) Write a statement about the question. Look over the quotes and prepare an overview integrating paragraph that describes responses to that question. A number of possibilities may occur. For example, the analyst may be able to compare and contrast differing categories. There may be a major theme and a minor theme. The analyst may discuss the variability of the comments, or even the passion or intensity of the comments. Following the overview paragraph, several additional paragraphs may be needed to describe sub-sets of views or to elaborate on selected topics. Compare and contrast how different types of respondents answered the question. If the analyst colour-coded the transcripts, then the colours may help the analyst to 'see' how the different types of respondents answered the questions. When finished, go on to the next question.</p>
<p>(9) Continue until all transcripts are reviewed. Some analysts like to prepare the descriptive summary immediately after the quotes for a question are placed on the large sheet of paper, but other analysts like to wait until all sheets are filled before writing. The benefit of delay is that it allows the analyst to rearrange quotes to places where they really belong.</p>
<p>(10) Take a break. Get away from the process for a while. Refocus on the big picture. Think about what prompted the study. It's easy to get sidetracked into areas of minor importance. Be open to alternative views. Be skeptical. Look over the pile of unused quotes. Invite a research colleague to look over your work and offer feedback.</p>

(11) Prepare the report. Look across the question summaries to see which themes cut across questions. Are there things that repeatedly come up? If so, consider structuring the report around these themes rather than around the questions. Consider whether some questions can be combined.

Source: Adapted from Krueger and Casey (2009, pp 118-122)

A number of variations of the classic analysis strategy are possible, including performing the analysis using a computer (Powell and Single, 1992; Krueger and Casey, 2009). For the purpose of conducting an efficient analysis, this current study employed a computer-based variant of the classic analysis strategy whereby a word processing program (Microsoft Word) was used for “cutting, pasting, sorting, arranging and rearranging data” (Rabiee, 2004, p 658). This approach also provided a more efficient means of tracing the source of each quote used later in the analysis process (Krueger and Casey, 2009).

The qualitative data analysis culminated in a narrative report of the focus group findings (presented in Chapter 7). The descriptive summaries written in the analysis were used to describe what was said about a particular question or theme. Quotes were selected from the categories identified to illustrate and capture the essence of what was said (Krueger and Casey, 2009). The anonymity of the participants was preserved through the use of pseudonyms in instances where verbatim reporting from the transcript occurred. The findings from the qualitative data analysis were consequently used to inform and enrich the quantitative findings obtained from the survey questionnaires. This allowed the researcher to make refinements to the features of Jone and Maples’ (2012b) proposed New Zealand tax mediation regime (presented in Chapter 8).

5.6.12 Qualitative Data Analysis Limitations

“One cannot escape the personal interpretation [of the researcher] brought to qualitative data analysis” (Creswell, 2003, p 182). Liamputtong, (2009, p 25) further states that “the experiences, beliefs, and personal history of the researcher that might influence their research must be acknowledged.” In this study it is acknowledged that, as with most other methods of qualitative data analysis, the classic analysis technique tends to rely heavily on the judgment of the analyst (Stewart *et al.*, 2007). The analyst determines which segments of the transcript are important, develops a categorisation system for the topics discussed by the group, selects representative statements regarding these topics from the transcript and develops an interpretation of what it all means (Stewart *et al.*, 2007).

When analysing focus group data, Krueger and Casey (2001, p 15) suggest that the analyst needs to consider many different aspects of the focus group and its participants’ responses, including: words the participants use in the discussion, the context of participants’ responses, internal consistency of the participants’ views, frequency or extensiveness of comments, intensity of feeling toward a topic, specificity of responses and “big ideas” that emerge from the discussion. These aspects (see Table 5.5) were taken into consideration by the researcher during the systematic process of analysing the focus group data in this current study.¹⁶⁸

¹⁶⁸ In addition, a draft copy of the analysis was reviewed by the researcher’s principal supervisor (having taken part as an observer of the focus group session) in order to verify the key issues addressed in the analysis.

Table 5.5: Focus Group Analysis Tips

Words Think about both the actual words used by the participants and the meanings of those words. A variety of words and phrases will be used and the analyst will need to determine the degree of similarity between these responses.
Context Participant responses were triggered by a stimulus – a question asked by the moderator or a comment from another participant. Examine the context by finding the triggering stimulus and then interpret the comment in light of that environment. The response is interpreted in light of the preceding discussion and also by the tone and intensity of the oral comment.
Internal consistency Participants in focus groups change and sometimes even reverse their positions after interaction with others. When there is a shift in opinion, the researcher typically traces the flow of the conversation to determine clues that might explain the change.
Frequency or extensiveness Some topics are discussed more by participants (extensiveness) and also some comments are made more often (frequency) than others. These topics could be more important or of special interest to participants. Also, consider what wasn't said or received limited attention. Did you expect but not hear certain comments?
Intensity Occasionally participants talk about a topic with a special intensity or depth of feeling. Sometimes the participants will use words that connote intensity or tell you directly about their strength of feeling. Intensity may be difficult to spot with transcripts alone because intensity is also communicated by the voice tone, speed, and emphasis on certain words. Individuals will differ on how they display strength of feeling and for some it will be a speed or excitement in the voice whereas others will speak slowly and deliberately.
Specificity Responses that are specific and based on experiences should be given more weight than responses that are vague and impersonal. To what degree can the respondent provide details when asked a follow up probe? Greater attention is often placed on responses that are in the first person as opposed to hypothetical third person answers.
Finding big ideas One of the traps of analysis is not seeing the big ideas. Step back from the discussions by allowing an extra day for big ideas to percolate. For example, after finishing the analysis the researcher might set the report aside for a brief period and then jot down the three or four of the most important findings. Assistant moderators or others skilled in qualitative analysis might review the process and verify the big ideas.

Source: Kruger and Casey (2001, pp 15-17)

5.7 Summary

This chapter describes the quantitative (survey questionnaire) and qualitative (focus group interview) methods used to achieve the objectives of this study. Mixing methods affords opportunities to use the strengths of some methods to counterbalance the weaknesses of other methods. As all methods have strengths and weaknesses, combinations of multiple methods that achieve this counterbalancing aim are particularly valuable. In this present study, employing quantitative and qualitative methods sequentially to collect data acts to allow the

findings from one strategy to inform the other. The information produced from the synergistic effect of the focus group setting may act to provide a deeper insight on the data obtained from the survey questionnaire. In line with the sequential nature of the mixed methods approach adopted, the quantitative and qualitative research results are presented separately in the following two chapters (Chapters 6 and 7, respectively). The resulting refined proposed New Zealand tax mediation regime is then outlined in Chapter 8.

Chapter 6

Research Results: Survey Questionnaire

6.1 Introduction

This chapter contains the results of the survey questionnaire on Jones and Maples' (2012b) proposed New Zealand tax mediation regime. Descriptive statistics have been used to describe the basic features of the data from the survey questionnaire. As previously noted, inferential statistical analysis has not been conducted as it is not the purpose of this study to make statements beyond the sample data (Sue and Ritter, 2012). This chapter consists of the following sections: a response analysis in Section 6.2, a descriptive statistical analysis of the responses to the individual survey questions in Section 6.3 and a summary of the additional comments made by some of the survey questionnaire respondents in Section 6.4. A chapter summary is then provided in Section 6.5.

6.2 Response Analysis

The survey questionnaire was conducted between October and November 2012. A total of 57 survey questionnaires and covering letters were initially emailed (as a word document attachment) to the purposively selected potential respondents on 16th October 2012.¹⁶⁹ One automated notice of delivery failure was received. This appeared to be an isolated incident and the survey questionnaire was subsequently delivered to the recipient after being resent. Three respondents reported difficulties in opening the word document attachment. The survey questionnaire was resent to these respondents in an alternative word document format. It is unknown whether these difficulties were more widespread and whether this may have had an

¹⁶⁹ As noted above in Chapter 5, Section 5.5.4, all potential respondents had been sent a pre-notification email, one week before the actual survey questionnaire was administered.

adverse impact on the response rate. Consequently, the follow-up reminder emailed to all non-respondents¹⁷⁰ on 30th October 2012 contained a duplicate copy of the original survey questionnaire re-attached in the alternative word document format. All respondents had until the 12th November 2012 to complete and return the survey questionnaire. A second follow-up reminder was made at the end of the four-week survey period to only six of the remaining non-respondents.¹⁷¹ These six non-respondents had each earlier indicated a willingness to the researcher and/or the researcher's principal supervisor to complete the survey questionnaire but had not yet returned their completed questionnaires.

6.2.1 Response periods analysis

Table 6.1 shows the number of responses by period of receipt, that is, after the initial survey questionnaire email, the first follow-up email and the second personalised follow-up to the selected non-respondents. Just over half (52.2 per cent) of the total responses were received following the initial emailing of the survey questionnaire, 34.8 per cent were received after the first follow-up and 13.0 per cent were received after the second follow-up.¹⁷²

¹⁷⁰ The number of non-respondents was 45 (derived from the initial sample of 57 less 12 responses received).

¹⁷¹ This follow-up was made by a personalised phone call to the three Canterbury non-respondents and by personalised follow-up emails to the three non-Canterbury non-respondents.

¹⁷² Note that given that the purpose of this study is not to draw generalisations to a wider population and that the size of the population of tax and mediation experts is unknown, procedures regarding representativeness of sample and non-response bias have not been conducted this study.

Table 6.1: Responses Received by Period of Receipt

Response period	Tax experts: Frequency (Percentage)	Mediation experts: Frequency (Percentage)	Total: Frequency (Percentage)
Initial survey questionnaire	6 (40.0)	6 (75.0)	12 (52.2)
First follow-up	6 (40.0)	2 (25.0)	8 (34.8)
Second follow-up (to selected non-respondents only)	3 (20.0)		3 (13.0)
Total	15 (100.0)	8 (100.0)	23 (100.0)

6.2.2 Response Rate

Table 6.2 sets out the sample sizes of each of the respondent types, the number of responses received from each of the respondent types and the corresponding response rates. The overall response rate achieved was 40.4 per cent, with a higher response rate being obtained from the tax experts (45.5 per cent) than the mediation experts (33.3 per cent).¹⁷³

Table 6.2: Response Rates by Respondent Type

Respondent type	Sample size	Number of respondents	Response rate
Tax experts	33	15	45.5%
Mediation experts	24	8	33.3%
Total	57	23	40.4%

The overall response rate achieved is higher in comparison to the average response rate for email surveys of 34 per cent reported by Shih and Fan (2008).¹⁷⁴ The higher response rate attained may, in part, be associated with the purposive selection of the tax and mediation experts utilised in this study. These experts were identified as having specialist knowledge and/or experiences relevant to the topic under study. Furthermore, the literature indicates that

¹⁷³ The higher response rate from the tax experts may, in part, be due to the familiarity of some of the tax experts with the researcher's principal supervisor (see above, n 133).

¹⁷⁴ However, it should be noted that the sample sizes in the 39 independent studies utilised in Shih and Fan's meta-analysis were all larger than the sample size in this current study. The sample sizes in Shih and Fan's analysis ranged from 110 to 12,677, with an average sample of 2,616: Shih and Fan, above n 121, at 256-257.

another factor (in addition to those outlined in Chapter 5, Section 5.5.4) which can potentially influence the response rate, is topic salience (Fan and Yan, 2010; Barrios, Villarroya, Borrego and Ollé, 2011). Topic salience is the importance that the population being surveyed attach to the subject matter (Barrios *et al.*, 2011). Barrios *et al.* (2011) claim that there is substantial evidence in self-administered surveys that when participants consider that a questionnaire has high topic salience, they are more likely to respond to it and the burden of responding to the questionnaire is compensated by their interest in the topic. Given the time constraints placed on respondents due to the nature of their professions, the respondents who completed the survey questionnaire in this current study were believed to attach a high level of importance to and interest in the topic under study and therefore were thought to have been willing to respond to the survey questionnaire.

In the context of taxation research, the response rate achieved in this study was much higher than the 1 per cent response rate reported for McKerchar's (2005) electronic survey of registered tax agents in Australia. The response rate achieved was also higher than the 8.6 per cent response rate achieved in Tran-Nam and Karlinsky's (2008) electronic survey of Australian tax practitioners and the 4.5 per cent response rate obtained by Lignier and Evans' (2012) electronic survey of small business compliance costs.

Nevertheless, as noted earlier, one of the factors which contributed towards non-response in this current study was the time constraints placed on the selected practitioners due to the nature of their professions. This was evident from some of the comments received from non-respondents, for example:

I am unable to assist with the questionnaire as I am out of Christchurch a lot this month and will not be able to give the time I think the questionnaire deserves.

[Practitioner's name] has been overseas for the last six weeks and has been unable to complete your survey.

I have been involved with the tour of an international visitor and am now off to Hong Kong for 10 days. I'm afraid the questionnaire will have to wait for my return. I am sorry for any inconvenience.

Similarly, a number of practitioners did not respond due to being 'out of office' at some stage during the survey period as indicated by a number of auto-response emails received by the researcher. Examples of the auto-responses received included:

I am out of the office, but have regular access to emails. If your enquiry is urgent, please contact me on [phone number supplied].

I am working out of town this week, with evening sessions included. If your query is urgent, please text or call and I will get back to you as soon as possible. Otherwise I will respond to your email as soon as possible.

6.3 Descriptive Statistical Analysis of Survey Questionnaire Responses

This section provides the frequency distributions of the nine survey questionnaire questions in both tabular and graphical forms.¹⁷⁵

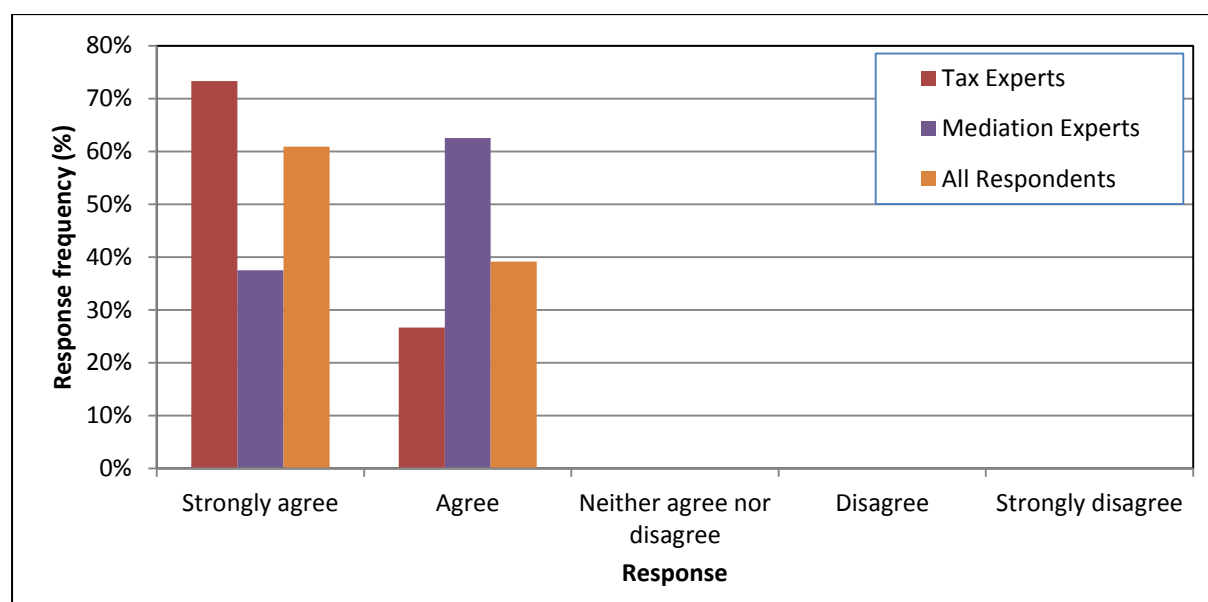
¹⁷⁵ The nine survey questionnaire questions are listed in Appendix 2 (and are reproduced in this section as indicated in the headings corresponding to Tables 6.3-6.11 and Figures 6.1-6.9).

With respect to question one, Table 6.3 and Figure 6.1 show that all respondents agreed that the mediator should be selected from a specialist panel of tax mediators independent of Inland Revenue. More specifically, 60.9 per cent of the total respondents strongly agreed and 39.1 per cent agreed.¹⁷⁶

Table 6.3: Frequency of Responses to Question One: The mediator should be selected from a specialist panel of tax mediators independent of Inland Revenue

Response	Tax Experts		Mediation Experts		All respondents	
	Count	Percentage	Count	Percentage	Count	Percentage
Strongly agree	11	73.3%	3	37.5%	14	60.9%
Agree	4	26.7%	5	62.5%	9	39.1%
Neither agree nor disagree						
Disagree						
Strongly disagree						
Total	15	100.0%	8	100.0%	23	100.0%

Figure 6.1: Frequency of Responses to Question One: The mediator should be selected from a specialist panel of tax mediators independent of Inland Revenue



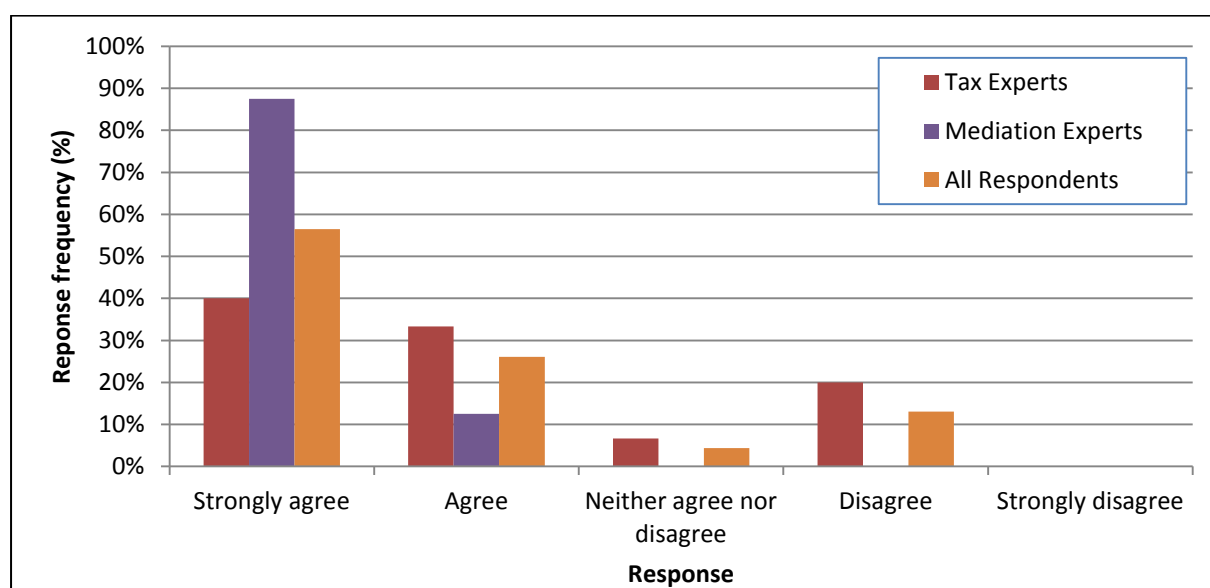
¹⁷⁶ Unless otherwise indicated, the percentages used in the descriptive statistical analysis of the survey questionnaire responses are based on n=23.

As shown in Table 6.4 and Figure 6.2, 82.6 per cent of the total respondents either strongly agreed or agreed that the information exchanged during the mediation process should be confidential (that is, not able to be used in a later hearing). 13.0 per cent disagreed and 4.3 per cent neither agreed nor disagreed. The neutral and dissenting views were all held by tax experts (with the dissenting views justified by the corresponding comments in Figure 6.11).

Table 6.4: Frequency of Responses to Question Two: Information exchanged during the mediation process should be confidential (that is, not able to be used in a later hearing)

Response	Tax Experts		Mediation Experts		All respondents	
	Count	Percentage	Count	Percentage	Count	Percentage
Strongly agree	6	40.0%	7	87.5%	13	56.5%
Agree	5	33.3%	1	12.5%	6	26.1%
Neither agree nor disagree	1	6.7%			1	4.3%
Disagree	3	20.0%			3	13.0%
Strongly disagree						
Total	15	100.0%	8	100.0%	23	100.0% ¹⁷⁷

Figure 6.2: Frequency of Responses to Question Two: Information exchanged during the mediation process should be confidential (that is, not able to be used in a later hearing)



¹⁷⁷ Note that, totals in the tables may not add to 100 per cent due to discrepancies caused by rounding.

Table 6.5 and Figure 6.3 show that 43.4 per cent of the respondents either strongly agreed or agreed that mediation should be a mandatory phase of the disputes resolution process. 30.4 per cent took a neutral position and 26.0 per cent of the total respondents either disagreed or strongly disagreed. The views held at each of the extremes (that is, strongly agree and strongly disagree) were all held by tax experts.

Table 6.5: Frequency of Responses to Question Three: Mediation should be a mandatory phase of the tax disputes resolution process

Response	Tax Experts		Mediation Experts		All respondents	
	Count	Percentage	Count	Percentage	Count	Percentage
Strongly agree	3	20.0%			3	13.0%
Agree	4	26.7%	3	37.5%	7	30.4%
Neither agree nor disagree	4	26.7%	3	37.5%	7	30.4%
Disagree	3	20.0%	2	25.0%	5	21.7%
Strongly disagree	1	6.7%			1	4.3%
Total	15	100.0%	8	100.0%	23	100.0%

Figure 6.3: Frequency of Responses to Question Three: Mediation should be a mandatory phase of the tax disputes resolution process

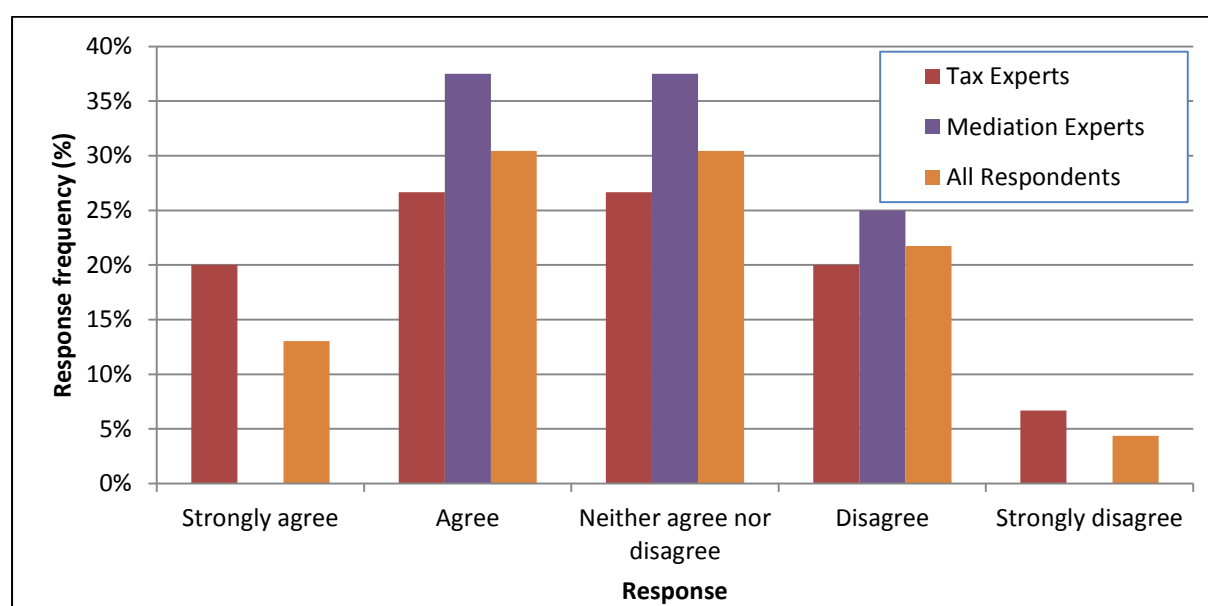
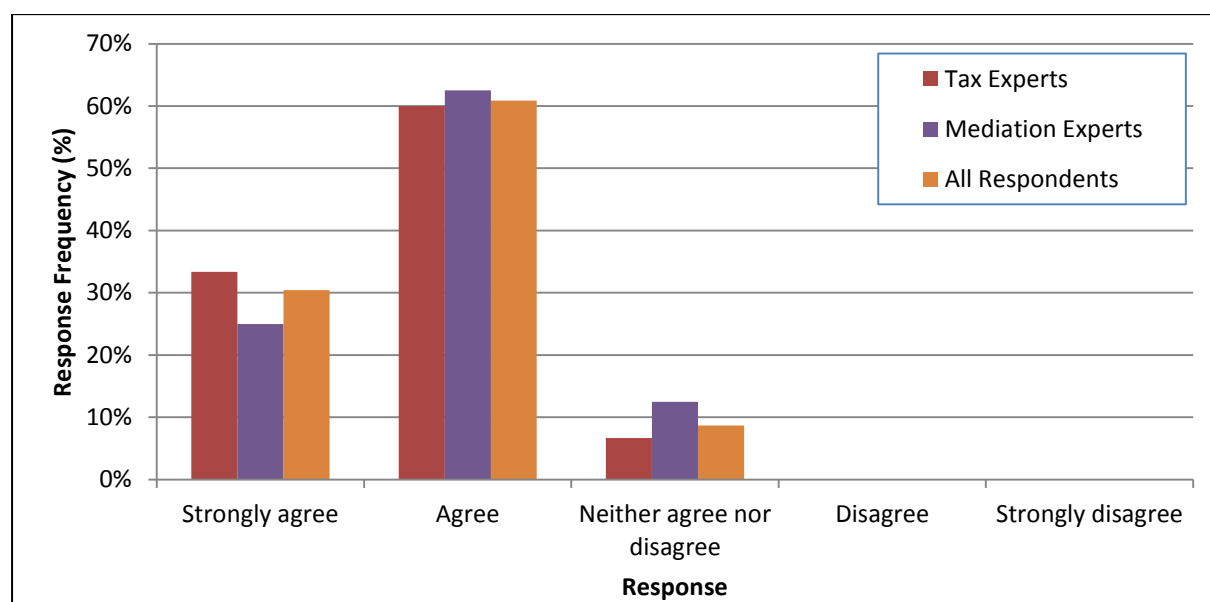


Table 6.6 and Figure 6.4 indicate that the majority (91.3 per cent) of the respondents either strongly agreed or agreed that the mediation phase should occur after the NOR stage of the tax disputes resolution process. The remaining 8.7 per cent of respondents neither agreed nor disagreed.

Table 6.6: Frequency of Responses to Question Four: The mediation phase should occur after the NOR stage of the tax disputes resolution process

Response	Tax Experts		Mediation Experts		All respondents	
	Count	Percentage	Count	Percentage	Count	Percentage
Strongly agree	5	33.3%	2	25.0%	7	30.4%
Agree	9	60.0%	5	62.5%	14	60.9%
Neither agree nor disagree	1	6.7%	1	12.5%	2	8.7%
Disagree						
Strongly disagree						
Total	15	100.0%	8	100.0%	23	100.0%

Figure 6.4: Frequency of Responses to Question Four: The mediation phase should occur after the NOR stage of the tax disputes resolution process

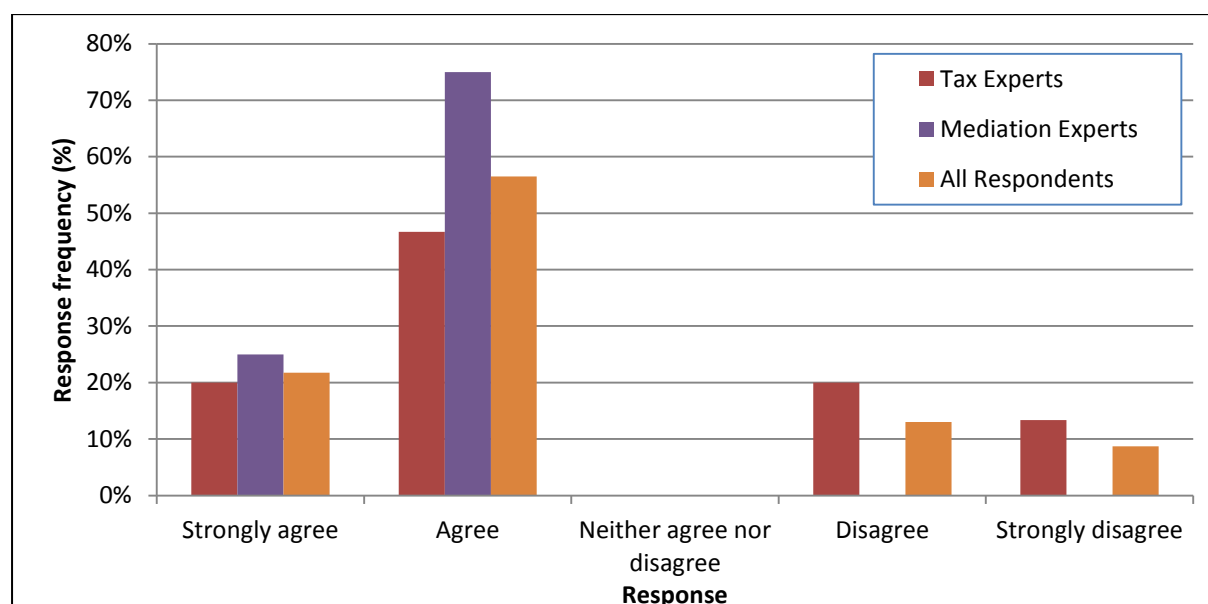


As shown in Table 6.7 and Figure 6.5, 78.2 per cent of the respondents indicated some form of agreement that certain types of tax disputes should be excluded from the mediation process. The remaining 21.7 per cent, who were all tax experts, either disagreed or strongly disagreed.

Table 6.7: Frequency of Responses to Question Five: Certain types of tax disputes should be able to be excluded from the mediation process (as outlined in Table 1)¹⁷⁸

Response	Tax Experts		Mediation Experts		All respondents	
	Count	Percentage	Count	Percentage	Count	Percentage
Strongly agree	3	20.0%	2	25.0%	5	21.7%
Agree	7	46.7%	6	75.0%	13	56.5%
Neither agree nor disagree						
Disagree	3	20.0%			3	13.0%
Strongly disagree	2	13.3%			2	8.7%
Total	15	100.0%	8	100.0%	23	100.0%

Figure 6.5: Frequency of Responses to Question Five: Certain types of tax disputes should be able to be excluded from the mediation process (as outlined in Table 1)



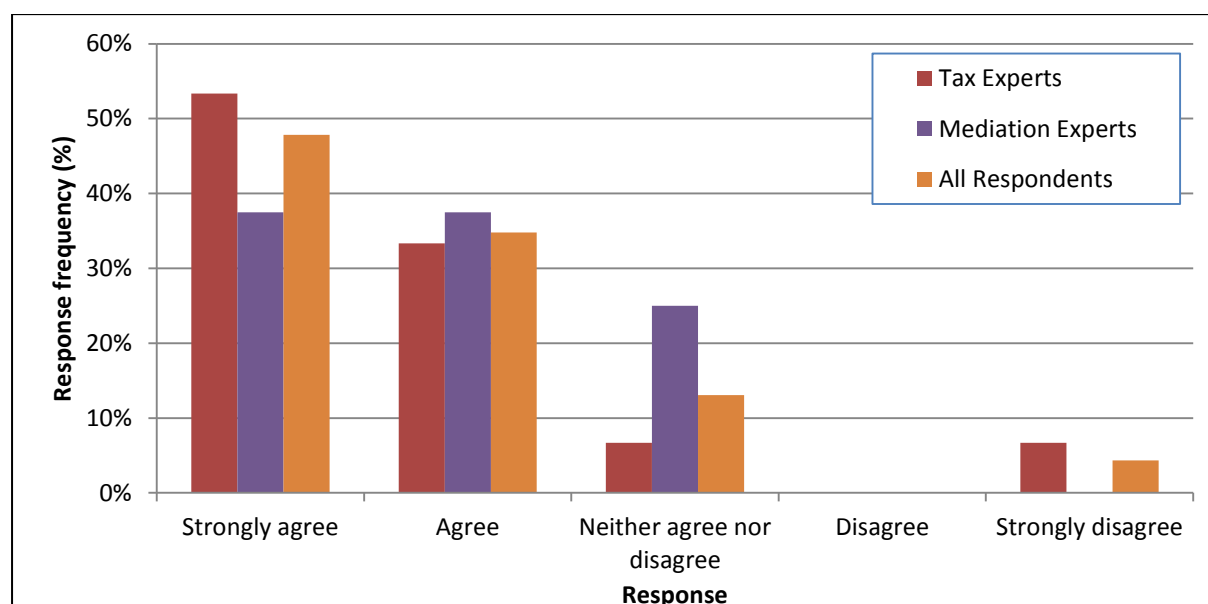
¹⁷⁸ Note that Table 1 in the survey questionnaire instrument (see Appendix 2) is identical to Table 4.1 in Chapter 4.

Table 6.8 and Figure 6.6 show that 82.6 per cent of the total respondents either strongly agreed or agreed that the mediation services provided should be at no cost to the taxpayer unless a private mediator is engaged by the parties. 13.0 per cent of the total respondents neither agreed nor disagreed and 4.3 per cent (a tax expert) strongly disagreed.

Table 6.8: Frequency of Responses to Question Six: The mediation services provided should be at no cost to the taxpayer unless a private mediator is engaged by the parties

Response	Tax Experts		Mediation Experts		All respondents	
	Count	Percentage	Count	Percentage	Count	Percentage
Strongly agree	8	53.3%	3	37.5%	11	47.8%
Agree	5	33.3%	3	37.5%	8	34.8%
Neither agree nor disagree	1	6.7%	2	25.0%	3	13.0%
Disagree						
Strongly disagree	1	6.7%			1	4.3%
Total	15	100.0%	8	100.0%	23	100.0%

Figure 6.6: Frequency of Responses to Question Six: The mediation services provided should be at no cost to the taxpayer unless a private mediator is engaged by the parties



In question seven, the absolute number of respondents expressing some form of agreement as to whether the mediation phase should occur only once in the tax disputes resolution process only just exceeded the number disagreeing. As shown in Table 6.9 and Figure 6.7 (on the next page), 43.5 per cent of the total respondents either strongly agreed or agreed that mediation should only occur once. Those who strongly agreed were all tax experts.¹⁷⁹ 34.8 per cent of the total respondents disagreed¹⁸⁰ and 21.7 per cent neither agreed nor disagreed.

¹⁷⁹ These tax experts' responses could arguably be viewed as being in line with the original objectives of the Richardson Committee of achieving the efficient and quick resolution of tax disputes.

¹⁸⁰ As indicated by the corresponding comments in Figure 6.11, some of the respondents that disagreed that the mediation phase should occur only once in the tax disputes resolution process justified their responses in suggesting that parties could perhaps be referred back to mediation after, inter alia, the clarification of issues at a later stage, the absorption of new information and/or after having reflected on the realities of their situation.

Table 6.9: Frequency of Responses to Question Seven: The mediation phase should occur only once in the tax disputes resolution process

Response	Tax Experts		Mediation Experts		All respondents	
	Count	Percentage	Count	Percentage	Count	Percentage
Strongly agree	6	40.0%			6	26.1%
Agree	2	13.3%	2	25.0%	4	17.4%
Neither agree nor disagree	2	13.3%	3	37.5%	5	21.7%
Disagree	5	33.3%	3	37.5%	8	34.8%
Strongly disagree						
Total	15	100.0%	8	100.0%	23	100.0%

Figure 6.7: Frequency of Responses to Question Seven: The mediation phase should occur only once in the tax disputes resolution process

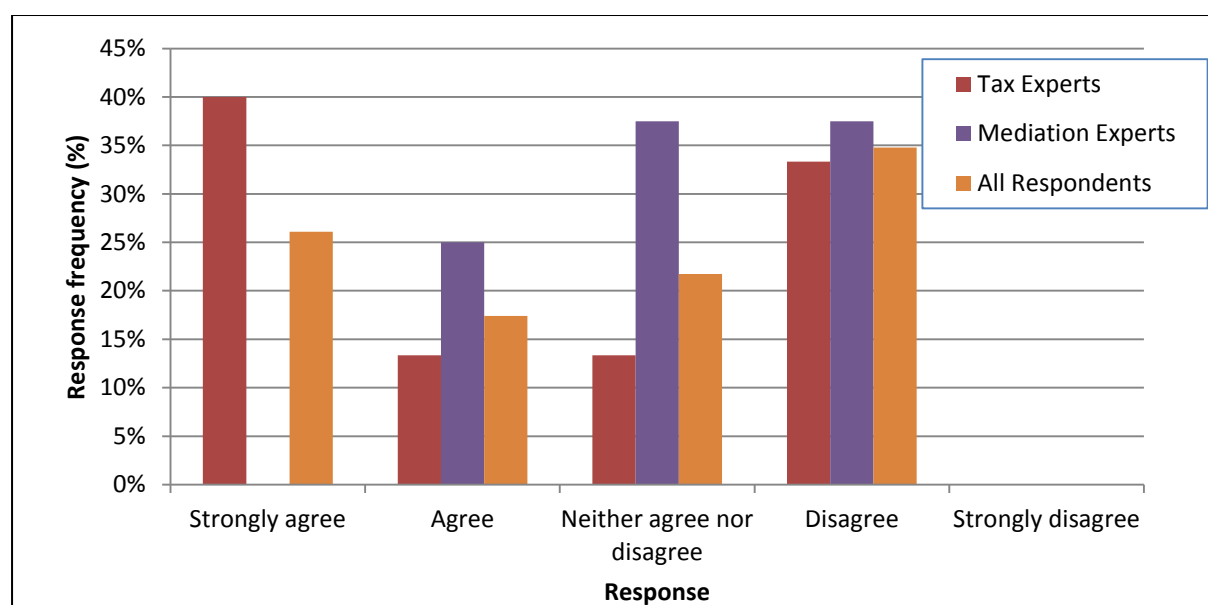


Table 6.10 and Figure 6.8 (on the next page) indicate that 65.2 per cent of the respondents either strongly agreed or agreed that, at the request of the parties to the dispute, the mediator should be able to make a recommendation on the resolution of the dispute. 30.4 per cent of the respondents either disagreed or strongly disagreed and 4.3 per cent took a neutral position. The distribution of responses from the tax and mediation experts differed in that a higher proportion of tax experts (86.6 per cent) than mediation experts (25.0 per cent)

expressed some form of agreement that the mediator should be able to make a recommendation, while a higher proportion of mediation experts (75.0 per cent) than tax experts (6.7 per cent) expressed some form of disagreement with this feature.

Table 6.10: Frequency of Responses to Question Eight: At the request of the parties to the dispute, the mediator should be able to make a recommendation on the resolution of the dispute

Response	Tax Experts		Mediation Experts		All respondents	
	Count	Percentage	Count	Percentage	Count	Percentage
Strongly agree	5	33.3%			5	21.7%
Agree	8	53.3%	2	25.0%	10	43.5%
Neither agree nor disagree	1	6.7%			1	4.3%
Disagree	1	6.7%	5	62.5%	6	26.1%
Strongly disagree			1	12.5%	1	4.3%
Total	15	100.0%	8	100.0%	23	100.00%

Figure 6.8: Frequency of Responses to Question Eight: At the request of the parties to the dispute, the mediator should be able to make a recommendation on the resolution of the dispute

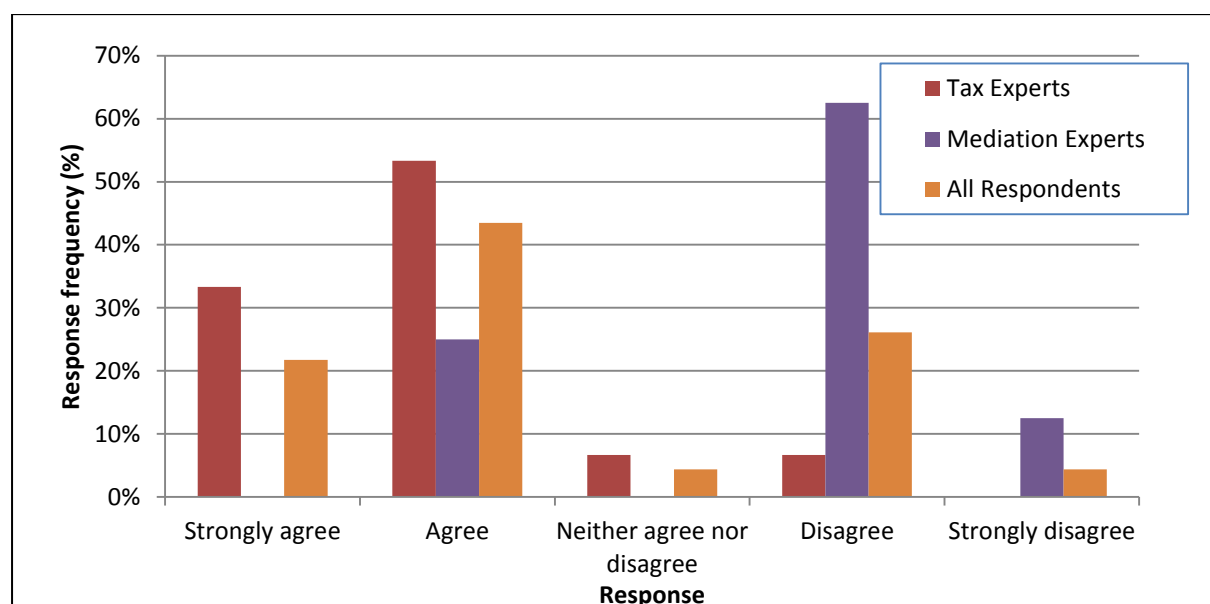
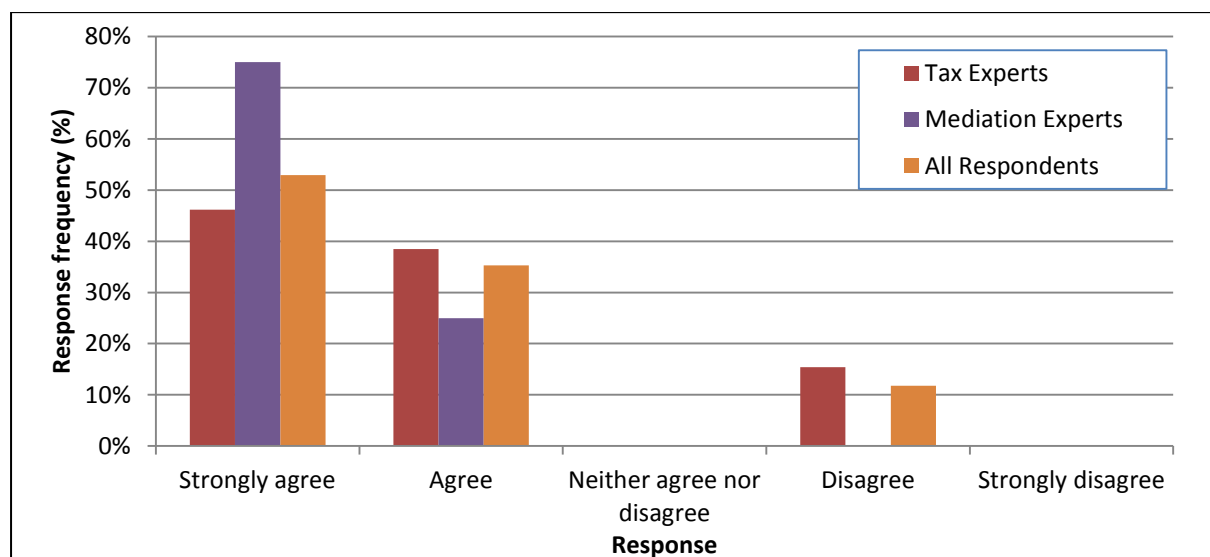


Table 6.11 and Figure 6.9 show that the majority (88.2 per cent) of the respondents that answered question nine (n=17),¹⁸¹ either strongly agreed or agreed that the parties should be able to reject the mediator's recommendation. The remaining 11.8 per cent, comprising of tax experts, disagreed.

Table 6.11: Frequency of Responses to Question Nine: The parties should be able to reject the mediator's recommendation

Response	Tax Experts		Mediation Experts		All respondents	
	Count	Percentage	Count	Percentage	Count	Percentage
Strongly agree	6	46.2%	3	75.0%	9	52.9%
Agree	5	38.5%	1	25.0%	6	35.3%
Neither agree nor disagree						
Disagree	2	15.4%			2	11.8%
Strongly disagree						
Total	13	100.0%	4	100.0%	17	100.0%

Figure 6.9: Frequency of Responses to Question Nine: The parties should be able to reject the mediator's recommendation



¹⁸¹ Note that respondents were only required to answer question nine if they had selected strongly agree, agree or neither agree nor disagree in question eight. The 17 respondents to question nine is derived from the 16 respondents to question eight who had selected strongly agree, agree or neither agree nor disagree, plus two respondents who answered question nine even though they had selected disagree in question eight, less one respondent who did not answer question nine even though they had selected neither agree nor disagree in question eight.

In summarising the above findings, the frequency distributions of the responses to the survey questionnaire indicate that the majority of the respondents in the nine Likert-scale questions, excepting questions three and seven, tended to agree with the suggested features of Jone and Maples' (2012b) proposed tax mediation regime. For question three, 43.4 per cent of the total respondents indicated that they either strongly agreed or agreed that mediation should be a mandatory phase of the disputes process (while 26.0 per cent either disagreed or strongly disagreed). 43.5 per cent of respondents in question seven indicated that they either strongly agreed or agreed that mediation should occur only once in the mediation process (while 34.8 per cent indicated that they disagreed).

The separate frequency distributions of the responses pertaining to the tax experts and the mediation experts show that the tax experts generally held a wider range of views than the mediation experts. The tax experts displayed a more diverse range of responses in all features of the proposed regime excepting that: the mediator should be selected from a specialist panel of tax mediators independent of Inland Revenue (question one) and that the mediation phase should occur after the NOR stage of the tax disputes resolution process (question four). Also, as noted earlier, in question eight a higher proportion of tax experts indicated that they agreed that the mediator should be able to make a recommendation on the resolution of the dispute at the request of the parties. Conversely, a higher proportion of mediation experts expressed some form of disagreement with this feature. These differences may reflect the respective areas of expertise of the two groups of experts.

6.4 Comments Received from Survey Questionnaire Respondents

The last question in the survey questionnaire was open-ended and offered respondents the opportunity to make any general comments with respect the proposed New Zealand tax

mediation regime. However, most of the comments made by the respondents related to the preceding questions in the survey questionnaire. Accordingly, Section 6.4.1 outlines the general comments made by respondents, while Section 6.4.2 outlines the comments provided by respondents that related to specific questions in the survey questionnaire. A total of 19 of the 23 respondents to the survey questionnaire (82.6 per cent) chose to provide comments.

6.4.1 General Comments

A selected sample of the general comments made by respondents to the survey questionnaire is provided in Figure 6.10. The comments appear in no particular order.

Figure 6.10: General Comments

This is an interesting idea and we support the view that an independent mediator should be available to the parties, rather than the current IRD facilitator ... Overall we think it is a good idea for a tax disputes system that is severely lacking in impartial and objective oversight until taxpayer have been put to prohibitive costs. However ... we would probably be more in favour of mediation in place of the current conference phase because there is still an option to proceed to Adjudication if the parties wish to do so. (Tax expert 1)

The problem with any form of ADR (conference, mediation, negotiation) is that it circumvents the rule of law. It is not clear to me that the Crown should be exercising an expropriative power like taxation in situations where the law is anything less than clear. The current disputes process often leads to the taxpayer acquiescing to what is 'fair' rather than legally owing – I fear mediation could exacerbate this. Nevertheless your proposal is an improvement on what we have now – most taxpayers are financially and emotionally exhausted by the time they get to the conference stage and agree to settlements simply in order to avoid further cost and stress. (Tax expert 4)

Currently the IRD uses a facilitation process in disputes. This involves an independent IRD official assisting during the conference phase. While not ideal in every respect, on the whole, in practice this works fairly well. The IRD takes this process seriously and is trying to use the conference phase for resolution. It needs to get some positive noise for its efforts here. (Tax expert 8)

When the Law Society and NZICA wrote the joint paper [in 2008] regarding the disputes regime we proposed that there be the ability for an independent mediator at the conference, with Government funding and/or for costs to be shared where needed. We had a very very lengthy process of discussion with the IRD following that ... The biggest issue for the IRD was cost and budget. (Tax expert 8)

I agree with the mediation concept, which as far as I can see, essentially replaces the conference phase. (Tax expert 10)

Generally, seems to me a good idea - kind of an extension of the current facilitated conference process. (Tax expert 14)

The general comments revealed some positive levels of support for the proposed New Zealand tax mediation regime. As evident in Figure 6.10, many of the respondents made some form of comparison or reference to Inland Revenue’s current conference phase and/or the facilitated conference process (utilising Inland Revenue facilitators). Also of note is that, one respondent commented that Inland Revenue’s existing conference facilitation process appeared to operate, on the whole, “fairly well” (Tax expert 8).

6.4.2 Comments on Survey Questions

A selected sample of the comments made by respondents relating to the nine questions in the survey questionnaire is provided in Figure 6.2, with the survey question commented upon as indicated.

Figure 6.11: Comments on Specific Survey Questions

Question One: The mediator should be selected from a specialist panel of tax mediators independent of Inland Revenue

We are not sure about the TRA appointed mediators. While theoretically this sounds suitable, it would be necessary to have a degree of specialisation to handle more complex tax issues even for mediation. The panel of specialists would either need to be very large, or there might be too much generalisation to efficiently mediate in more complex matters. It is also important ... to be clear about what the appropriate background and qualifications might be. There is an element of personality involved in good mediation, even though obviously tax knowledge will also be important. (Tax expert 1)

Why can’t mediator actually be TRA judge as it is for Family and Employment mediation? (Tax expert 6)

Who the mediators will be, given these are tax matters, and the small pool of available practitioners of sufficient technical knowledge and what they will be paid, is also a practical issue. You may well get practitioners acting as mediators who are not that experienced – not ideal – won’t engender confidence in the process ... For more complex disputes the mediator’s experience/capacity to do this will be an issue. (Tax expert 8)

One challenge is finding a pool of truly independent and suitably skilled professionals to be mediators. The pool is automatically narrowed due to the complexities of tax law and practice and many have acted for many! (Tax expert 10)

My limitation to answering “agree” is the number and availability of qualified tax mediators. I am aware that the IRD are training IRD officers to act as facilitators in tax disputes and it is possible that you could have mediators who are IRD employees. However, it is usual in a mediation context to have a mediator who is clearly independent of both parties. (Tax expert 12)

Question Two: Information exchanged during the mediation process should be confidential (that is, not able to be used in a later hearing)

I disagree that information exchanged should be confidential. This would be a one-sided exclusion as IRD would still retain all its information gathering powers (section 17 [TAA 1994] etc) and could always seek confirmation as to what was discussed in this fashion. Instead it would be best that any information that a party wishes to rely on needs to be confirmed in writing by the other party. This would enable “off the cuff” statements to be reflected on. (Tax expert 11)

Re confidentiality ... Isn't it more that the information is provided "without prejudice" - ie not able to be used in subsequent proceedings. Insofar as that relates to information, given the CIR's powers, seems a little pointless. He can get it anyway. He would not want to feel fettered from doing so through other channels. Insofar as it relates to concessions or proposals designed to get a settlement, those obviously must be without prejudice. (Tax expert 14)

Should participants be “punished” for using mediation by being prevented from raising information exchanged? (Tax expert 15)

Question Three: Mediation should be a mandatory phase of the tax disputes resolution process

In my view mediation should **never** be mandatory; sometimes it is going to be completely pointless and this will simply be a waste of time and cost. For example, if there's a question of law and differing views, the parties ought to be able to agree to "opt out" of mediation. (Tax expert 8)

Certain disputes should be able to by-pass mediation due to their nature which may make mediation a time-delaying “hoop” to have to go through. (Tax expert 15)

I am less in favour of mandatory mediation but if one party requests it then the other should not have a veto. (Mediation expert 4)

Question Four: The mediation phase should occur after the NOR stage of the tax disputes resolution process

This [mediation] could be done in place of the current conference phase, which might be simpler because it provides the parties with the option following mediation of agreeing to “opt out” and go to Court, or proceed to complete the disputes process. (Tax expert 1)

Agree mediation should involve NOPA & NOR & then IRD facilitation conference. If no agreement then taxpayer can file challenge – & TRA mediation is 1st step in challenge process. (Tax expert 6)

The facilitation process is cheap, and operates fairly well for a large majority of disputes. Mediation ought not replace this in my view. It should come after the NOR, but also after the facilitated conference, where it is necessary. It should be able to happen as often as the parties agree it ought in the context of the dispute. (Tax expert 8)

I think that the conference stage should really be replaced by a compulsory mediation. And that the NOPA/NOR stage should be the only documents exchanged ie we should do away with the SOP stage. (Tax expert 9)

A conference phase, before mediation, would still be useful ... While it may be rare, you may resolve or settle a dispute at a conference. (Tax expert 10)

How would this fit into existing procedures? Would it replace the conference phase (I would have thought, yes). Would it replace Adjudication - possibly also yes? (Tax expert 14)

Question Five: Certain types of tax disputes should be able to be excluded from the mediation process (as outlined in Table 1)

I strongly agree that certain disputes should be able to be excluded from mediation ... The question ... is whether there is an inherent public interest in tax disputes that makes them unsuitable for mediation. I think not, generally ... Perhaps there could be an early determination process as to whether the dispute is suitable, with certain threshold criteria, e.g. the amount in dispute, the identity of the parties, etc. Having said that, it's the cases involving large amounts and/or high profile corporate taxpayers that usually see the IRD incurring enormous legal bills, which might be saved if a compromise is reached. (Mediation expert 5)

Question Six: The mediation services provided should be at no cost to the taxpayer unless a private mediator is engaged by the parties

I think you need to be very mindful of the cost constraints of the government when thinking about this issue, the IRD has budgetary constraints and existing allocations of its funding. While in principle a free and fully funded mediation proposal is sensible (and I believe the IRD is fine with it in principle), there is no money that can easily fund this kind of service. (Tax expert 8)

If the IRD runs an expert panel of tax mediators and also pays their costs, there is an inevitable risk that the mediators may come to be seen as having been captured by the IRD ... I do not think there is anything wrong in asking taxpayers to fund a half share of the mediation if they choose that route. I also think that the prospect of success in a mediation is far higher where both sides have invested in the process than were only one side has done so. (Mediation expert 8)

Question Seven: The mediation phase should occur only once in the tax disputes resolution process

May be situations where certain points are clarified at a higher level; could an issue then be referred back to mediation? (Tax expert 15)

Regarding the mediation only occurring once - Sometimes people's thinking changes either after absorbing new information or having reflected on the realities of their situation. Some people may not be able to articulate their views clearly either. If either party indicated willingness to enter mediation at a different stage to that proposed ... I think it should be considered. (Mediation expert 6)

Question Eight: At the request of the parties to the dispute, the mediator should be able to make a recommendation on the resolution of the dispute

I am not in favour of the mediator being a decision maker as this will just end in a quasi TRA. (Mediation expert 4)

A form of mediation/arbitration model has been proposed that has benefits and drawbacks. People will often present information in a more adversarial way in mediation if they know the case might be arbitrated. (Mediation expert 6)

In my experience ... if the mediator has any capacity to recommend an outcome the whole focus of the parties from the beginning is on trying to persuade the mediator that their view is the right one rather than working on the issues with the other party to gain resolution. That possibility detracts strongly from the mediation process. (Mediation expert 7)

Question Nine: The parties should be able to reject the mediator's recommendation

The Commissioner will insist on being able to reject any recommendation made by the mediator, as this would otherwise be an abdication of the Commissioner's assessment function. (Tax expert 3)

The comments made by respondents in Figure 6.11 identify various practical issues regarding the selection and the funding of the mediator. Several respondents noted that if the panel of mediators was to comprise of tax specialists, a potential limitation was that there would only “be a small pool of practitioners available of sufficient technical knowledge” (Tax expert 8). Comments relating to whether mediation should be provided as a fully-funded service indicate issues with respect to feasibility and (to a lesser extent) the potential perception that mediators may be seen as having been “captured by the IRD” (Mediation expert 8). One

respondent suggested that the taxpayer(s) involved in the particular dispute should fund a “half share” of the mediation instead of it being fully-funded (Mediation expert 8). The comments also reveal differing views of the respondents in relation to question four – as to whether the mediation phase should replace or come after the current conference phase of the disputes resolution procedures.

Upon reviewing the comments made by the respondents in conjunction with the information presented by the frequency distributions of the survey questionnaire responses, the following issues for further exploration of the survey questions can be derived:¹⁸²

- Who should the mediator be?
- What background and qualifications should they have?
- Could the mediator be a TRA judge?
- How should the confidentiality provisions operate?
- Should mediation be mandatory? Why/why not?
- When should the mediation phase occur?
- Should mediation replace the conference phase? Or replace facilitated conferences?
- Should mediation only occur once in the tax disputes resolution process? Why/why not?
- Should certain types of disputes be excluded from mediation?
- On what basis should this be determined?
- Who should make this determination?
- How should the mediation services be funded?

¹⁸² Note that these questions were used as probes for the key question category in the focus group questioning route (see Appendix 8).

- Should the mediator be able to make a recommendation on the dispute at the request of the parties?
- Should the parties be able to reject the mediator's recommendation?

6.5 Summary

This chapter presents the results of the survey questionnaire. Excepting two questions, the majority of respondents in the nine survey questions indicated some level of agreement (that is, strongly agreed or agreed) with the suggested features of Jone and Maples' (2012b) proposed tax mediation regime. Respondents showed less agreement with respect to whether mediation should be a mandatory phase of the disputes process, with 43.4 per cent of the total respondents indicating some level of agreement. Also, only 43.5 per cent of the total respondents agreed that mediation should occur only once in the mediation process. Following the sequential mixed methods approach adopted, the focus group will explore the possible reasons behind the survey questionnaire findings in more depth. In order to enrich and inform the information obtained, the issues highlighted in the comments provided by respondents, including, but not limited to: who the mediator should be; when in the disputes resolution procedures the mediation phase should occur (and whether it should replace the conference phase); and how the mediation services should be funded, will also be explored. The next chapter presents the research findings from the focus group interview.

Chapter 7

Research Results: Focus Group Interview

7.1 Introduction

This chapter presents the findings from the focus group interview. Section 7.2 describes the composition of the focus group. The findings from the focus group discussion are then presented in Section 7.3. The approach taken has been to present the findings largely in the order of the topics outlined in the focus group questioning route. However, it should be noted that the topics were not necessarily discussed in the order presented owing to the spontaneous and contingent nature of the focus group discussion. Furthermore, not all questions in the questioning route were necessarily covered and additional areas were explored where appropriate. Verbatim quotes drawn from the focus group transcript have been used to illustrate key points in the findings. Section 7.4 of this chapter provides a summary of the main findings from the focus group.

7.2 Composition of the Focus Group

The focus group participants comprised of two tax accountants (one of whom was a partner in an accounting firm and the other, a former senior Inland Revenue investigator), two tax lawyers (one of whom was a barrister and the other, a partner in a law firm) and one contract mediator. The inclusion of the mediation practitioner provided important insights from a non-tax perspective. The inclusion of the tax practitioner with a background in tax disputes as an Inland Revenue investigator was also valuable in providing insights from the ‘other side of the fence’. As previously noted, all participants were from the Canterbury area and with the exception of the mediation practitioner, all participants were known to each other. It was felt

that the familiarity of the tax practitioner participants with each other contributed towards the free-flowing discussion amongst the focus group participants.

The focus group discussion was lively and uninhibited and the participants were confident in their opinions. Although the participants shared similar points of view on many aspects of the discussion, the variation in the practitioners also allowed for some differences in opinions. Consistent with the focus group literature, the variation in participants also meant that they were able to both question each other and build on each other's responses. The focus group ran for just under one and a half hours, although it was felt that the participants would have been happy to talk for much longer than the time allowed.

7.3 The Focus Group Discussion

7.3.1 General Comments

The focus group participants thought that the proposal for tax mediation generally seemed like a good idea. It was thought that the process seemed logical and “flowed quite well in terms of when it would be implemented” (Tax lawyer 2). The appointment of an independent mediator was identified as being an important feature:

... it's good in that you might get a sensible person to come in and look at what the Commissioner is doing and perhaps tell them to “stop being silly”. We don't have that at the moment, you have no impartial person coming into the dispute, standing back and taking an overall view, which isn't very good. (Tax lawyer 1)

A key point highlighted by the participants was that the most valuable thing about mediation was that it provided the opportunity for taxpayers to feel that they had been heard even though they might not have reached an agreement through mediation:

One of the big advantages, where I thought this thing was a really good idea, is the fact that you can sort of achieve success in this without having an agreement at the end though, because just having that independent person in there, I think, was the biggest plus ... (Tax lawyer 1)

The mediation practitioner felt that mediation would also play an important role in restoring relationships and maintaining the ongoing relationship between Inland Revenue and taxpayers:

... they may just think that it will be helpful to talk to them, just across the table with an independent person because there's often a lot of bad feeling created there ... So, just to build a few bridges. (Mediator 1)

However, a number of problems in relation to the proposed mediation regime were also identified in the initial part of the focus group discussion. One of these was the number of people appropriately trained in tax and also in mediation that would be available to mediate the potential number of tax disputes utilising the proposed mediation regime:

My initial thought was the availability of actually properly trained tax mediators and people who would be: (a) available; and (b) you know, properly trained in tax and in mediation ... for the amount of dispute resolutions that may come across the IRD's desk. (Tax lawyer 2)

In addition, it was believed that a fundamental issue to mediation being able to work was the fact that the Commissioner is not an ordinary party to litigation and has interests which go beyond a particular dispute and relate to other taxpayers:

... what I think is the fundamental issue with this is, how can the Commissioner mediate, yet still meet the requirements under the Tax Administration Act to think about other taxpayers' precedents ...? (Tax lawyer 1)

Inland Revenue penalties were also identified as another factor which distinguished disputes with the Commissioner from disputes occurring in other contexts. The tax practitioners noted that in most disputes with the Commissioner, there is a punitive element in terms of shortfall penalties¹⁸³ and how the proposed mediation regime would operate in conjunction with the imposition of shortfall penalties was seen to be another fundamental problem in terms of mediation being able to work. However, this aspect was not further elaborated on by the focus group participants.

7.3.2 Changes to Legislation

Participants were of the view that if mediation was simply to be a phase inserted into a certain stage of the current disputes process as opposed to mediation being part of an overall change to the whole disputes process, then significant changes to the TAA 1994 would not be required.

¹⁸³ Shortfall penalties may be imposed by the Commissioner in relation to a "tax shortfall" (defined in s 3(1) of the TAA 1994 as the "difference between the tax effect of: (a) a taxpayer's tax position for the return period; and (b) the correct tax position for that period"). For a summary of the different categories of shortfall penalties imposed by Inland Revenue (for example, shortfall penalties imposed for: not taking reasonable care; taking an unacceptable tax position; gross carelessness; taking an abusive tax position; and evasion or similar acts), see Coleman J and Trombitas E *Disputes with the IRD* (New Zealand Law Society, Wellington, 2009) at 81-91. See also, ss 141A-141E TAA 1994.

The tax practitioners also did not believe that modifications would be required in terms of s 6A TAA 1994 (regarding care and management):

I don't think there would be a change needed to that [s 6A] because you can settle on the basis of litigation risk under that and maximum return. (Tax lawyer 1)

However, given the tax practitioners' belief that a number of disputes potentially would involve the remission of penalties, it was foreseen that some changes to the Commissioner's rulings in relation to debt remission generally¹⁸⁴ and settlement would be necessary if mediation were to be employed within the disputes process:

But certainly a lot of these disputes might involve remission of penalties, so there would have to be a change there, but that's only to the rulings. But presumably if the Commissioner did this type of thing, the Commissioner would put out a ruling, you know, a public statement or a ruling as to what is proposed. (Tax lawyer 1)

7.3.3 The Mediator

There was an overall consensus amongst the focus group participants that the mediator should be selected from a panel of mediators from an organisation independent of Inland Revenue such as AMINZ or LEADR. It was clear from the discussion that the participants thought that the mediator should come from an organisation of mediators rather than be a (TRA) judge. The participants suggested that the normal practice should be for the mediator to be selected by AMINZ or LEADR (or alternatively the NZLS or NZICA) on a "whoever's

¹⁸⁴ Debt remission generally includes the remission of the tax debt outstanding as well as the remission of penalties and interest charged on the outstanding tax debt (if applicable). For further information, see Inland Revenue *Debt options* (IR 582, Wellington, April 2013a). See also, s 177 TAA 1994.

next up” basis (Tax accountant 2). One participant likened this to the selection process used for appointing arbitrators:

Well ... often the situation with arbitrators is: agreements often provide for an arbitrator to be appointed by, you know, nominated by ... the local Law Society, and they just go through the list and do it that way. I mean you could have a similar situation, but not have Inland Revenue do it. (Tax lawyer 1)

Another participant suggested that an alternative option for selecting the mediator could be for the mediator to be chosen by the taxpayer off a panel of mediators listed on a website. A similar system to this is currently employed for Earthquake Commission (EQC) mediations:

EQC have a system where the panel of mediators for EQC is on a website and the customer can choose, and those [mediators] that have had more cases than the others just drop off that list for a while. (Mediator 1)

The independence of the mediator from both parties was highlighted by one participant as being the most important factor:

... just having that independent person in there, I think, was the biggest plus for taxpayers because you are often in a dispute where either the taxpayer or the Commissioner are completely entrenched ... So, getting an independent person just in there, looking at their facial expressions or whatever, is a good thing. (Tax lawyer 1)

Although the participants assumed that the mediator would be a person with “some sort of tax knowledge” (Tax accountant 1), there was a strong consensus that “the important thing with

the mediator is being a qualified mediator” (Tax lawyer 1) and not the specialist tax knowledge, as one participant commented:

Well, they just really need to be a sensible person. I mean, there are a lot of lawyers that are members of AMINZ and it may be that with a tax dispute that involves a technical matter, that they could be involved even if they’re not tax experts. (Tax lawyer 1)

However, it was noted that in some instances it would be appropriate to have a mediator with specialist tax knowledge. For example:

I can certainly see that there would be some mediations where it would be appropriate to have someone with specialist knowledge ... It depends on the type of mediation. If it’s a very large, complex tax dispute that did require an understanding of say, international tax rules, that would be different. (Tax Lawyer 1)

The focus group participants agreed that it would be “easier to take a mediator and train them in [the tax] area rather than the reverse” (Mediator 1). It was also agreed that it was important for the mediator to have some degree of tax training in order to “know what’s relevant and what’s not” in relation to a particular dispute (Mediator 1). It would be the responsibility of AMINZ, LEADR or an equivalent organisation to ensure that mediators had the required level of training.

As noted in Section 7.3.1, one concern initially raised in the focus group was that of the actual availability of “properly trained tax mediators” for the amount of disputes that could potentially come across Inland Revenue’s table (Tax lawyer 2). Depending on how many

disputes there were, it was thought that this could create a possible “backlog” in terms of getting disputes processed (Tax lawyer 2). However, it should be noted that this initial concern was raised on the assumption made in Jone and Maples’ (2012b) original proposed New Zealand tax mediation regime (and as outlined in the supplementary document to the survey questionnaire), that the panel of mediators would comprise of specialist tax professionals (for example, tax accountants and tax lawyers) who were then trained in mediation, rather than the reverse (that is, qualified mediators who are then trained in tax) which was subsequently proposed by the focus group participants.¹⁸⁵

7.3.4 Confidentiality of the Mediation

The issue of confidentiality was not discussed in great depth in the focus group. However, the participants appeared to accept that, consistent with usual mediation practice, the mediation and the terms of any settlement would remain confidential. While the information discussed at mediation would remain confidential, it was suggested that if the parties wanted information to go forward to a further stage, they could write a “clarification letter” of what had been agreed to or clarified and what information with their permission could go forward to the next stage so that parties did not have to “rehash it all” (Mediator 1).

7.3.5 Mandatory Mediation

The focus group participants were of the view that mediation should only be a mandatory process for disputes under a “certain level” (Tax lawyer 1). Although the ‘certain level’ was not specifically determined by the participants, it was suggested that mandatory mediation would be most suitable for small unrepresented taxpayers. It was agreed that over a certain

¹⁸⁵ Arguably, there would be a greater number of qualified mediators who are subsequently trained in tax than specialist tax practitioners subsequently trained in mediation that would be potentially available to mediate tax disputes.

level, where there were “significant sums involved and professional advisors”, mediation should not be mandatory (Tax lawyer 1). However, one participant commented that:

... some cases, irrespective of the amounts, probably are never going to find their way through [to mediation] are they, for a mandatory process? Cos IRD just want to take it to court ... (Tax accountant 1)

Mandatory mediation for small unrepresented taxpayers was justified on the following basis:

... little taxpayers, I think, you know the smaller disputes where it's just an individual against Inland Revenue and they don't have advisors. They would probably get the most benefit cos even if they come out still paying the tax they didn't want to pay, at least they feel like they've been able to put their case forward and be listened to, cos at the moment they probably feel that that doesn't happen. (Tax lawyer 1)

7.3.6 Stage of the Mediation Phase

There was a difference of views between the mediation practitioner and the tax practitioners in the focus group in relation to when in the disputes resolution process that mediation should occur. The tax practitioners were of the view that mediation should come after the conference phase of the existing disputes resolution process. On the other hand the mediation practitioner stated:

The earlier the better, I'd say even before the conference phase if possible. I mean you can mediate at any stage, it's just always the earlier the better because once you get positions, you get entrenchment. (Mediator 1)

The mediation practitioner provided the following reasoning:

There are several mediation scenarios [where] they have studied this [parties presenting their positions first] and have decided that it is not good for the parties to present their positions first. Really, a mediation tries to concentrate on the reasoning and not the positions. (Mediator 1)

... the mediation perspective is: “there is an issue here and we’re all going to work on it” ... rather than starting off with the: “this is your side, this is my side”, you know. That division initially is something that if you’ve established it, you have to break it down. The mediator has to break it down and sometimes it can be quite difficult if it has gone on for a while, which it usually has by the time you get to it. (Mediator 1)

However, it was noted by the tax practitioners that in the context of tax disputes, taxpayers have already taken their positions in the NOPA and the NOR:

... at the very beginning in the Notice of Position and the Notice of Response, they’ve sort of taken their positions. They gotta take positions and that starts a dispute, unfortunately. (Tax lawyer 1)

The tax practitioners further stated that the conference phase was a phase in which parties became more aware of the evidence each party had and of the legal issues. Therefore, mediation was thought to be appropriate after that phase as parties came away (from the conference) with more of an understanding of the dispute and each other’s positions:

... until the conference phase is out of the way you really don't know what each other's side is. Even though we go into the conference phase thinking we might get a settlement, very rarely that ever happens. It's really about more sharing of your positions. (Tax accountant 1)

One tax practitioner also noted that having mediation before the conference stage would be difficult because:

... they are going into mediation and all they may have done would be to have exchanged documents. So you may spend quite a bit of time in your mediation where they are trying to understand each other's positions. (Tax lawyer 1)

It was clear that the tax practitioners thought that mediation should not replace the existing conference phase as the conference was viewed as "still very valuable" (Tax accountant 1) in terms of getting 'all cards on the table' and for parties to be fully informed before proceeding to mediation:

... the idea with the disputes [process] was: "let's get as much on the table before we go to court so that parties might agree" and the conference phase was sort of the final part of it, really, before getting into the really legalistic side of it. (Tax accountant 1)

Mediation was further viewed as a potential way of alleviating the entrenchment between parties following the conference phase:

... you are often in a dispute where either the taxpayer or the Commissioner are completely entrenched and I don't think the conference phase changes that. If anything, everyone seems

to back in their corners more after the conference phase. So getting an independent person just in there ... is a good thing. (Tax lawyer 1)

7.3.7 Types of Disputes Suitable for Mediation

It was apparent from the discussion that certain types of tax disputes, due to their nature, would not be suitable for mediation:

... for some taxpayers [mediation's] just not going to happen because there's bigger issues going on and it's unfortunate but we are just going to have to live with it, I think, if something like this came up. (Tax accountant 1)

A number of different types of tax disputes were identified as not being suitable for mediation, including: disputes for which evasion was being considered for a particular taxpayer; disputes which Inland Revenue were potentially going to prosecute on; and disputes for which there needed to be public precedent. Cases of tax avoidance such as *Penny and Hooper v Commissioner of Inland Revenue* [2011] NZSC 95, (2011) 25 NZTC 20-073 (*Penny and Hooper*) were also identified as not being suitable for mediation.

Well, you couldn't do ones that they were gonna prosecute on, obviously. (Tax lawyer 1)

And there needs to be public precedent and that kind of thing. (Mediator 1)

I think if evasion's being considered you can't have mediation. (Tax lawyer 1)

I was thinking of the likes of a *Penny and Hooper*. I don't think that they would want that going through mediation would they? (Tax accountant 1)

The issue of whether the dollar amount of a dispute could also be an indicator of the importance of a particular issue as opposed to the substance of the issue itself was discussed. The tax expert participants noted that settlements over a certain amount had to be approved by various levels of authority within Inland Revenue. It was thought that the practical requirements to go through certain steps to obtain approval for settlements of various amounts would preclude some disputes over a certain value from mediation:

... for Inland Revenue there are all sorts of steps and when you go over a certain amount then it has to be approved by different levels, and you go up to one amount and it has to be approved by the Minister ... can't have the Minister of Inland Revenue sitting there in a mediation. (Tax lawyer 1)

It was also recognised that mediation would not be suitable for tax disputes involving “querulants”¹⁸⁶ (Mediator 1) or (as interpreted by the tax practitioners) “vexatious litigants” (Tax lawyer 1):

If it's a free service, they will abuse it. They just take cases no matter what, you know, lots and lots of cases through all the systems and they just exhaust the system. (Mediator 1)

However, the tax practitioners believed that this would possibly be less of an issue in the context of tax disputes given that:

¹⁸⁶ Mullen and Lester note that: “included among the querulous are three broad types, unusually persistent complainants, vexatious litigants, and those who in pursuit of idiosyncratic quests harass the powerful and prominent with petitions and pleas.”: Mullen PE and Lester G “Vexatious litigants and unusually persistent complainants and petitioners: From querulous paranoia to querulous behaviour” (2006) 24 Behavioral Sciences and the Law 333 at 334.

... to get to the mediation you will still have to have gone through the Notice of Response, you know, Notice of Proposed Adjustment, Notice of Response, so if someone's gonna do hundreds of those ... (Tax lawyer 1)

It was clear from the discussion that the tax disputes to be excluded from mediation should not be determined by Inland Revenue, given the potential for Inland Revenue to attempt to by-pass mediation on every possible occasion, as one participant commented:

... there is going to be pressure on the process because the IRD will say "well, this, we're not going to mediate this one." (Tax accountant 1)

7.3.8 Funding of the Mediation Services

In line with mediation in other areas such as Accident Compensation Corporation (ACC), the real estate and the telecommunications industries where the cost of mediation is covered by the respective overarching bodies, it was agreed that the cost of mediation should be covered by Inland Revenue and effectively treated as a service which they provided. While it was agreed that the mediator's service costs would be covered, other additional costs such as those associated with representation and advice would be met by the taxpayer disputant(s).

Although the participants believed that it would be "logical" that Inland Revenue would meet the costs of mediation, they noted that meeting these costs could be a "big issue" for Inland Revenue particularly if they were a large amount of disputes (Tax accountant 1). Nevertheless, it was acknowledged that there could be possible cost savings to Inland Revenue from having mediation in terms of savings from not having to go through the disputes process further.

7.3.9 Number of Times Mediation Should Occur

It was not discussed as to whether mediation could occur at a number different phases during the disputes process or only at one distinct phase. However, the issue of whether there could be several mediation meetings was explored. It was agreed that there would have to be a limit on the number of meetings, as one participant commented:

Certainly IRD will limit it, there's no doubt about that. Because [in] the conference phase, pretty much you have one go. Well, it's not always [the case], but it just could get so drawn out if you didn't say: "well, we are only to have one meeting." It seems a little bit draconian, but you just got to have that don't you? Because otherwise it just drags on. (Tax accountant 1)

There was a general consensus that, given that the parties would have already gone through the NOPA, NOR and conference stages of the disputes process before reaching the mediation phase, the number of mediation meetings should be generally limited to one or two. It was thought that two meetings could be of value if it was necessary for parties to gather supporting information:

... usually we go in with the idea that it's just one. But then it's up to the mediator to say: "well, there's a lot of things we don't know here, we need to find them out before we can do anything about it, so we'll meet again next week this time and find it out." (Mediator 1)

It was believed that a limit of two meetings was a reasonable compromise in terms of funds and it was also recognised that it would be necessary to have a limit on the number of mediation meetings in order to avoid the potential abuse of the mediation process by taxpayers:

... if you stand back and look at it and certainly from IRD's point of view, there's got to be something put in place to cap it. I mean, if people get serious from day one, if they know that there are only two bites of the cherry ... (Tax accountant 1)

The possibility of conducting mediation in forms other than face-to-face was also raised. In particular, mediation via video conference was suggested, with one tax practitioner providing the following rationale:

Cos Wellington's pretty much, at the moment, still where a lot of these people sit that are going to make the decisions on some of these reasonable [-sized] tax disputes, so IRD would have to fly down or people here fly up, and time and everything, you know, it could become an issue. (Tax accountant 1)

Although, mediation conducted face-to-face was the form most preferred by mediator, who made the following comparison with mediation in ACC:

... they [ACC] are actually pushing for face-to-face. They want to restore a relationship and that's the most powerful thing about mediation: restoring relationships and that ongoing relationship. (Mediator 1)

7.3.10 The Ability for the Mediator to Recommend a Solution

The question as to whether the mediator should be able to make a recommendation on the dispute was not addressed in great detail in the focus group discussion. The mediation practitioner noted that generally the role of the mediator is to facilitate discussion between the two parties. It was further noted that mediators do not usually suggest a resolution to the dispute (which is officially called conciliation). It is dependent on the mediator which

processes they use, however conciliation could be one of the processes used. Consequently, the issue of whether or not parties should be able to reject the mediator's recommendation if one was made was not brought up in the focus group discussion.

7.3.11 Number of People at Mediation and People with Authority to Settle at Mediation

The participants identified that the number of people (from each side) present at mediation could be a potential issue given the situation that currently occurs in Inland Revenue meetings:

Well, you don't want the normal situation where you've got five Inland Revenue people and one taxpayer, or one taxpayer and their advisor, which is common when you go to Inland Revenue meetings. (Tax lawyer 1)

Although the tax practitioners agreed that having "really big numbers on one side and little numbers on the other side" (Tax lawyer 1) could be intimidating for the taxpayer, it was acknowledged that having fewer people was not necessarily better as it was important to have the "right" people from Inland Revenue at the mediation (Tax accountant 1):

... basically with IRD in conference phase you often have four or five [Inland Revenue representatives] there, which I will really want because we want to get the right people there to make hopefully the right decisions and to get the message across. (Tax accountant 1)

The mediation practitioner agreed that the number of people present at mediation would be dependent on the issue and it was part of the mediator's role to address the power imbalance created between the parties:

... it depends on the issue, less is not better if you need the information. You need the people at the table to give the information, and who can make the decisions and add the input at any given stage. There is an imbalance problem, you know, with the other person. The customer, the claimant ... they can feel overwhelmed, obviously, by having five people [there]. But that, in part, is up to the mediator to balance. (Mediator 1)

Whether there should be a maximum number of people present at mediation (for both sides) was not discussed. However, a further issue was raised in relation to having people with requisite authority to settle present at mediation:

People have to come to mediation who can make the decision though. I mean, if one person goes along and now that we've got an agreement, we've got to go and check with so and so, it's not really [very efficient]. (Tax lawyer 1)

Although, from a practical perspective it was acknowledged that not having a person with authority to settle at mediation in itself was not necessarily a barrier to mediation occurring:

I mean in the ideal world, people should be there to make the decision. But the reality in life is that it is not going to happen as much as you would like and especially in tax, with some of the bigger cases ... It's just going to be something that you have to work through. But you wouldn't want to have it subject to A, B, C and D. It's just got to be subject to A. You know,

you don't want to have too many 'subject to's' because otherwise it becomes a bit of a farce doesn't it? (Tax accountant 1)

It was undisputed amongst the participants that the mediation agreement would be binding once signed by the parties to the mediation. This is consistent with general mediation practice:

Yeah, so the sole purpose [is] just a typical mediation where it [is] agreed to be binding. (Tax accountant 1)

7.3.12 Culture Change of Inland Revenue

The participants acknowledged that mediation would require a culture change on the part of Inland Revenue towards accepting mediation within the disputes procedures. Although, as with the application of mediation in other industries, it was agreed that this would be a process that would require time:

I was sort of [involved] near the beginning of the ACC mediations and I have seen it [again] this year, so I've seen the cultural changes in the people who do it, [who] represent ACC. So, that's just a process that takes a while. (Mediator 1)

It was clear from the discussion that a change in Inland Revenue culture would be necessary in order to shift away from the current view of Inland Revenue as a litigating party:

They are quite a different 'animal' to any other sort of ... Well, I shouldn't really say animal. But, you know, to any other sort of litigant or party you are dealing with. They are quite different to anyone else. (Tax lawyer 1)

There was a general consensus amongst the participants that, subject to the cost of mediation, taxpayers would be receptive to the idea of mediation. Even though they might not necessarily ‘win’ or reach an agreement, it was believed that mediation would provide taxpayers with the opportunity to reconsider their positions and look at the time and money potentially required for them to continue with the dispute (and also the costs of potential litigation):

Well, I think that subject to cost, you know, that’s gonna be the question of whether the uptake will be there. Because if it’s gonna cost, well, will they do it? You know, is it going to be limited to the few that can afford it? (Tax accountant 1)

... you might not get agreement, but you could get the situation where people go away and rethink their positions and say: “I won’t carry on with this dispute”, and I think that’s a successful outcome and I could see that happening. I could see that happening more than agreement in mediation in tax disputes, cos people finally have the opportunity to talk and have an independent person. (Tax lawyer 1)

As noted earlier, it was perceived that mediation could potentially enhance the relationship between Inland Revenue and taxpayers, as has been observed in other industries which have adopted mediation such as ACC:

... and IRD would be the ‘good guy’. They are paying for this mediation, they are paying for you to chat to them about this and, you know, that’s what you could say about ACC: “thank you very much ACC for providing this service” and it’s kind of [like], as angry as the person, the claimant is, they have to appreciate that this is all being paid for. (Mediator 1)

7.4 Summary

The above findings from the focus group interview illustrate that the discussion covered a wide range of issues in relation to the proposed tax mediation regime. The discussion highlighted that the focus group participants felt that the most important aspect of the mediation regime was having an independent person ‘just in there’ thus, enabling taxpayers the chance to put their cases forward and feel that they had the opportunity to be heard. It was felt that the process would be of most benefit for small unrepresented taxpayers as even though they might not have necessarily ‘won’ or reached an agreement at the end of the mediation, it nevertheless provided them with an opportunity to rethink their positions and decide whether or not to commit to continuing with the dispute. On this basis the focus group participants thought that mediation should only be a mandatory process for disputes under a certain amount (that is, encompassing small unrepresented taxpayers).

The focus group further highlighted that the participants thought that it was more important for the mediator to be a qualified mediator rather than for the mediator to have specialist tax knowledge. However, it was recognised that the mediation of complex tax disputes would potentially require specialist tax knowledge.

The discussion also revealed that the tax practitioner participants thought that the mediation phase should occur after the existing conference phase of the disputes process as opposed to replacing it. It was felt that the conference phase was important in terms of putting ‘all cards on the table’ and clarifying the issues before parties entered into mediation. Coming from a non-tax perspective, the mediation practitioner however, held the differing view that mediation should occur even earlier than the conference phase, before parties had adopted entrenched positions.

The participants thought that the inclusion of mediation within the tax disputes procedures was generally a good idea. However, they raised several issues which they believed were fundamental to mediation operating in the context of tax disputes, including the need for the Commissioner to consider other taxpayers' precedents and also how mediation would operate in conjunction with the imposition of shortfall penalties.

The next chapter brings together the findings from both the survey questionnaire and the focus group interview to produce a refined version of Jone and Maples' (2012b) proposed New Zealand tax mediation regime.

Chapter 8

Discussion of Results: Refined Proposed New Zealand Tax Mediation Regime

8.1 Introduction

This chapter draws together the research findings from the survey questionnaire (presented in Chapter 6) and the focus group interview (presented in Chapter 7) in order to refine the features of Jone and Maples' (2012b) proposed New Zealand tax mediation regime and consequently present a refined tax mediation regime for New Zealand.¹⁸⁷ Section 8.2 provides a synthesis of the findings from the survey questionnaire and focus group interview. Section 8.3 then presents the refined proposed New Zealand tax mediation regime and discusses the rationale behind the features of the refined regime. Section 8.4 addresses some additional issues raised in the research findings as well as in the literature, pertaining to the refined proposed regime and Section 8.5 summarises the chapter.

8.2 Synthesis of the Research Findings

8.2.1 The Mediator

Both the survey questionnaire and focus group findings indicated that the mediator should be selected from a specialist panel of mediators independent of Inland Revenue. However, the findings from the survey questionnaire and the focus group differed in the respect that the comments made in the survey questionnaire indicated that many of the respondents thought

¹⁸⁷ As stated in Chapter 5, Section 5.2, additional information was also obtained through a video conference held by the researcher with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013, regarding an aspect of Inland Revenue's current tax disputes resolution procedures (namely, facilitated conferences). The purpose of the discussion was in order to provide a contextual background to, and clarify the researcher's understanding of, certain issues associated with the refined proposed New Zealand tax mediation regime which resulted from the survey questionnaire and focus group findings (as outlined in Sections 8.3 and 8.4).

that the mediator would be a tax practitioner with specialist tax knowledge. Moreover, survey respondents further commented that the small pool of available tax practitioners with sufficient technical knowledge (and who were truly independent) that would potentially be available to mediate tax disputes, presented a practical issue. On the other hand the focus group participants indicated that they believed it was more important for the mediator to be a qualified mediator rather than for the mediator to be a tax specialist. The focus group participants further suggested that the mediator should be appointed by an independent organisation of mediators such as AMINZ or LEADR. It was thought that the mediator should be selected from the panels of AMINZ or LEADR on a “next up” basis (Tax accountant 2). The participants believed that it would be easier to train a mediator in the tax area rather than in the reverse. It was suggested that AMINZ and LEADR should be responsible for ensuring that the mediators on their panels had the required level of tax training for conducting tax mediations. However, comments made in the survey questionnaire and in the focus group interview both noted that the mediation of more complex tax issues would require a mediator with specialist (rather than general) tax knowledge.¹⁸⁸

8.2.2 Confidentiality of the Mediation

The survey questionnaire and the focus group findings both show that the information exchanged at mediation should be confidential. However, several comments in the survey questionnaire identified a possible limitation that the confidentiality requirement would be a “one-sided exclusion” as Inland Revenue would still retain its information gathering powers

¹⁸⁸ It is also worth noting that one respondent to the survey questionnaire observed that even though tax knowledge is important, there is also “an element of personality involved in good mediation” (Tax expert 1). The mediation literature also states that “a good mediator must possess a variety of ‘soft skills’ and human qualities.” Examples of these include, but are not limited to: listening skills; communication and negotiation skills; stamina, patience and tolerance; and emotional sensitivity. Some of these skills may be acquired through training courses or prior practical experience, others are innate. For a further discussion and examples of the soft skills and human factors required from a good mediator, see Berger KP *Private Dispute Resolution in International Business: Handbook* (Kluwer Law International, The Hague, 2006) at 137.

under s 17 TAA 1994¹⁸⁹ and could always seek confirmation as to what was discussed through this “channel” (Tax expert 11).¹⁹⁰ Notwithstanding this peculiarity of tax law, the focus group participants noted that it is consistent with usual mediation practice that the mediation and the terms of any settlement are confidential. It was suggested that if parties wanted information to go forward to a further stage, any information from the mediation that a party wished to rely on should be confirmed in writing by the other party. Comments made in the survey questionnaire also indicated that there would need to be provision for the “settlement phase” of any mediation to be conducted on a “without prejudice” basis (Tax expert 14).

8.2.3 Mandatory Mediation

The findings from the survey questionnaire indicated that less than half of the respondents either agreed or strongly agreed that mediation should be a mandatory part of the disputes process.¹⁹¹ Comments made in the survey questionnaire suggested that mandatory mediation for certain disputes, due to their nature, would be “completely pointless” and “a waste of time and cost” (Tax expert 8). The subsequent focus group discussion revealed that the participants thought that mediation should only be a mandatory process for disputes under a certain (unspecified) level. Although, it was thought that the level should encompass small

¹⁸⁹ Section 17 of the TAA 1994 empowers the Commissioner to require any person to “furnish in writing any information and produce for inspection any documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts or for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner.”

¹⁹⁰ For a further discussion on the use of the Commissioner’s s 17 powers during litigation see, Keating M “Comment: The use of the Commissioner’s powers during litigation” (2007) 13 New Zealand Journal of Taxation Law and Policy 195. See also, *Vinelight Nominees Ltd v Commissioner of Inland Revenue* (2005) 22 NZTC 19,298 (HC).

¹⁹¹ As shown in Table 6.5 in Chapter 6, 43.4 per cent of the respondents either strongly agreed or agreed that mediation should be a mandatory part of the disputes resolution process, 30.4 per cent neither agreed nor disagreed and 26.0 per cent either disagreed or strongly disagreed.

unrepresented taxpayers, whom the participants felt would potentially benefit the most from mediation.

8.2.4 Stage of the Mediation Phase

The survey questionnaire findings indicated that the majority (91.3 per cent) of the respondents agreed that the mediation phase should occur after the NOR stage of the current disputes procedures. However, the comments in the survey questionnaire revealed differing opinions as to whether mediation should replace the current conference phase or come after it. This issue was subsequently explored in the focus group interview where the tax participants were of the view that mediation should occur after the conference phase. This was justified on the basis that the conference phase was necessary for parties to put ‘all cards on the table’ and to obtain a greater understanding of each other’s positions before proceeding to mediation. However, coming from a purely mediation perspective, the sole mediation practitioner in the focus group believed that mediation should occur even earlier in the disputes process, that is, before the parties had adopted entrenched positions.

8.2.5 Types of Disputes Suitable for Mediation

Both the survey questionnaire and focus group findings show that certain types of disputes should be excluded from the mediation process. The focus group discussion highlighted particular types of disputes which the participants felt would not be suitable for mediation. These disputes included: disputes involving certain cases of tax avoidance; disputes for which evasion was being considered for a particular taxpayer; disputes which Inland Revenue were potentially going to prosecute on; disputes for which there needed to be public precedent; and certain disputes involving vexatious litigants.

8.2.6 Funding of the Mediation Services

The survey questionnaire and focus group findings both show that the mediation services provided should be at no cost to the taxpayer. However, comments made in both the survey questionnaire and in the focus group interview questioned the feasibility of Inland Revenue being able to provide a fully-funded mediation service utilising independent mediators. The focus group further found that while it was agreed that the mediator's service costs would be covered by Inland Revenue, other additional costs such as those associated with representation and advice should be met by the taxpayer disputant(s).

8.2.7 Number of Times Mediation Should Occur

The results from the survey questionnaire illustrate that less than half of the respondents either agreed or strongly agreed that the mediation phase should only occur once in the tax disputes process.¹⁹² Several comments made in the survey questionnaire suggested that the mediation phase should occur more than once in the disputes process. For example, in situations where certain points were clarified at a later stage in the disputes process and/or where parties had been able to reflect on the realities of their situations, it was suggested that parties could be referred back to mediation. While the focus group did not discuss the issue as to whether the mediation phase should occur at only one stage of the disputes process, it was suggested that the number of mediation meetings during the mediation phase should generally be limited to two meetings.

¹⁹² As shown in Table 6.9 in Chapter 6, 43.5 per cent of the respondents either strongly agreed or agreed that mediation should only occur once, 34.8 per cent either disagreed or strongly disagreed and 21.7 per cent neither agreed nor disagreed.

8.2.8 The Ability for the Mediator to Recommend a Solution

The survey questionnaire results show that while the majority (65.2 per cent) of the tax experts agreed that on the request of the parties, the mediator should be able to make a recommendation on the resolution of the dispute, the majority of the mediation experts disagreed. The comments made in the survey questionnaire revealed concerns (from the mediation experts) that the ability for the mediator to make a recommendation could result in parties acting in a more adversarial way rather than working on the issues with the other party to gain resolution. The subsequent findings from the focus group were consistent with the survey questionnaire responses from the mediation experts. The focus group discussion indicated that it is generally the role of the mediator to facilitate negotiation between the parties in order to assist them to resolve the dispute and the mediator does not usually recommend a solution.

8.2.9 Whether Parties Should be Able to Reject the Mediator's Recommendation

The survey questionnaire results indicated that the majority (88.2 per cent) of those respondents who thought that the mediator should have the ability to recommend a solution also thought that the parties should be able to reject the mediator's recommendation. The focus group did not discuss this aspect given that, as noted above, it was raised that it is not usual practice for the mediator to make a recommendation on a solution to the dispute.

8.3 The Refined Proposed New Zealand Tax Mediation Regime

Drawing on the research findings noted above in Section 8.2, the refined suggested key features of Jone and Maples' (2012b) proposed tax mediation regime are outlined in Table 8.1:

Table 8.1: Refined Suggested Key Features of Jone and Maples’ (2012b) Proposed Tax Mediation Regime

Key features of the regime	Jone and Maples’ (2012b) suggestions	Refined suggestions
Legislation	Part IVA TAA 1994.	Mediation will not be legislated for but will be an administrative process in the disputes procedures in (revised versions of) SPS 11/05 and SPS 11/06.
Mediator type	Member of a panel of independent specialist tax mediators appointed by (an enhanced) TRA and employed by the Courts of New Zealand, or in instances where the parties request a private mediator, a person engaged for the purpose and considered to be suitable by the TRA.	Member of a panel of mediators from AMINZ or LEADR, appointed by AMINZ or LEADR on a ‘next up’ basis. AMINZ or LEADR would be responsible for ensuring that the mediators on their panels have the required level of training in tax.
Confidentiality	Information provided at mediation is confidential and is not able to be used in a later hearing unless parties agree. The confidentiality of information exchanged during the mediation process would be legislatively provided for under Part IVA of the TAA 1994.	The mediation and terms of settlement are confidential. However, any information from the mediation which a party wishes to rely upon if unresolved issues proceed to a further stage, should be confirmed in writing by the other party. Any communication made and any materials prepared for the purpose of negotiating a settlement or resolution should be treated as being on a ‘without prejudice’ basis.
Mandatory	Mediation is mandatory (subject to the exclusions below).	Mediation is not mandatory.
Stage of the disputes resolution process that the mediation phase occurs	After the issue (and subsequent rejection by the other party) of a NOR by either the taxpayer or the Commissioner.	After the conference phase.
Types of disputes mediation is available for (and types of disputes excluded)	The types of disputes for which mediation is available is not restrictive. However, mediation may not be appropriate where: it would be in the public interest to have judicial clarification of the issues in dispute; resolution can only be achieved by departure from an established ‘Inland Revenue view’ on a technical issue; the dispute is of a kind where the state of the relationship between the parties is such that any proposed mediation is unlikely to be successful; the dispute concerns a frivolous issue; the dispute involves certain procedural issues.	Mediation will be offered for unresolved issues to taxpayers who have completed the conference phase. Although, some disputes may not be suitable for mediation, for example: disputes involving certain cases of tax avoidance; disputes for which evasion is being considered for a particular taxpayer; disputes which Inland Revenue is potentially going to prosecute on; disputes for which there needs to be public precedent; certain disputes involving vexatious litigants; and disputes concerning frivolous issues.

Key features of the regime	Jone and Maples' (2012b) suggestions	Refined suggestions
Cost to taxpayer disputant(s)	None. However, if a private mediator is engaged by the parties, then the costs involved in employing the mediator are to be agreed on between the parties.	The mediation services provided will be at no cost to the taxpayer disputant(s). However, additional costs such as those associated with representation and advice are to be met by the taxpayer disputant(s).
Number of times that the mediation phase can occur in the tax disputes resolution process	Once. However, more than one mediation session may be held during the mediation phase if this is deemed beneficial by both of the parties and by the mediator.	The mediation phase will occur only once in the disputes procedures. The number of mediation sessions in the mediation phase will generally be limited to two sessions.
Role of mediator (that is, facilitative and/or evaluative)	<p>Facilitative. The mediator will assist the parties to identify the disputed issues, develop options and consider alternatives in an endeavour that the parties reach their own agreement on the issue(s) in dispute. The mediator will have no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution between the parties is attempted.</p> <p>Evaluative. If an agreement cannot be reached by the parties through mediation, the parties can together choose to allow the mediator to make a recommendation on how to resolve the dispute.</p>	Facilitative. The mediator will assist the parties to discuss the disputed issues, develop options and consider alternatives in an endeavour that the parties reach their own agreement on the issue(s) in dispute. The mediator will have no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, (that is, the mediator will not have the ability to recommend a solution to the dispute), but may advise on or determine the process of mediation whereby resolution between the parties is attempted.
Binding agreement	<p>Any agreement reached by the parties themselves through mediation is final and binding on them once the agreement is signed by both of the parties and the mediator.</p> <p>Where the parties together agree to give the mediator the authority to make a recommendation on how to resolve the dispute; the mediator's recommendation will then be full, final and enforceable unless either of the parties notifies the mediator within seven days of the mediator's recommendation; that they reject the recommendation made.</p>	Any agreement reached by the parties themselves through mediation is final and binding on them once the agreement is signed by both of the parties and the mediator.

As with Inland Revenue's existing conference phase, the refined proposed mediation regime will not be provided for in legislation but will constitute an administrative phase of the disputes procedures.¹⁹³ As it is not prescribed in legislation, mediation will not be mandatory for either Inland Revenue or taxpayers to attend. However, it will constitute standard Inland Revenue practice to offer taxpayers mediation for unresolved issues following the conference phase.¹⁹⁴ Mediation is not mandatory given that some parties may not regard it as useful and moreover, certain tax disputes by their nature may not be suitable for mediation. However, as the findings of this study suggest, mediation (albeit as an administrative process) should ideally encompass most instances of disputes between small taxpayers¹⁹⁵ and Inland Revenue.

The research findings indicate that a critical aspect of the mediation regime is that the mediator is an independent person and not an internal Inland Revenue officer. The focus group findings indicate that it is also important for the mediator to be a trained and skilled mediator (who would subsequently receive some training in the tax area), rather than for the mediator to be a tax expert (with subsequent training in mediation). The focus group participants noted that these aspects of the mediation regime are consistent with the mediation of disputes in other areas such as ACC and EQC. As the appointment of the mediator will be made by an organisation independent of Inland Revenue, taxpayers will not

¹⁹³ Inland Revenue considered that legislating for the conference phase would restrict the "flexibility as to the procedures by which conferences may be conducted and the outcomes that may be achieved.": Campbell and Hendriksen, above n 29, at [3.4]. This provides supporting rationale for similarly suggesting that the proposed mediation phase should not be legislated for.

¹⁹⁴ As noted in Chapter 4, Section 4.4, with respect to the current conference phase, Keating states that anecdotally "[it] is rare for the IRD not to offer a conference and it would be unusual for a taxpayer to refuse to attend.": Keating, above n 11, at 165. Discussions by the researcher with Inland Revenue staff also indicate that it is extremely rare for Inland Revenue not to offer a conference: Video conference with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue, Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013.

¹⁹⁵ As defined in Chapter 2, Section 2.2 as including individual taxpayers and enterprises employing five or fewer staff. See above n 10.

have the option of engaging a private mediator as in Jone and Maples' (2012b) proposed regime.

The findings from this study suggest that it is consistent with usual mediation practice that the mediation and the terms of any settlement are confidential. However, in line with the suggestions made by a number of the research participants, any information from the mediation that a party wishes to rely on if unresolved issues from the dispute proceed to a further stage, should be confirmed in writing by the other party. It was thought that this would allow "off the cuff" statements to be reflected on (Tax expert 11). As with the existing conference phase, any communication made and/or documents prepared for the purpose of negotiating a potential settlement or resolution of the dispute will be treated on a 'without prejudice' basis.

The findings from both the survey questionnaire and the focus group interview indicate some support for the view that the existing conference phase should be retained and that mediation should occur after the conference phase. On this basis, while they will remain two distinct phases, the researcher suggests that mediation should be integrated with the existing conference phase as one stage of the dispute resolution procedures: the 'ADR stage'. The research findings indicate that the conference phase was viewed by the participants as an important part of the disputes procedures in terms of parties putting 'all cards on the table' and getting "a really good feel face-to-face of where the other side sits" (Tax accountant 1). While the conference can provide the opportunity for parties to reach a negotiated settlement to their dispute, the findings of this study suggest that, anecdotally, settlement "very rarely"

occurs in the conference phase (Tax accountant 1).¹⁹⁶ Therefore, the existing conference phase will constitute the first step of the ADR stage, enabling parties to exchange material information in relation to the dispute and proceed to mediation more fully aware of each other's positions.¹⁹⁷ On the basis that no (or only partial) agreement¹⁹⁸ is reached at the conference phase, the mediation phase will constitute the second step of the ADR stage where the mediator will assist the parties to reach their own resolution to the dispute. In order to avoid any potential duplication of processes in the conference and mediation phases, it is suggested that the same independent mediator conduct both phases of the ADR stage.¹⁹⁹

Following usual mediation practice and in line with the views of the majority of the mediation participants in this research, the mediator will adopt a purely facilitative role and will not have the ability to make a recommendation on the dispute at the request of the parties. As previously noted, the ability for the mediator to make a recommendation could result in parties acting in a more adversarial way rather than working on the issues with the other party to gain resolution. Furthermore, it was thought that if the mediator has the capacity to recommend an outcome then the focus of the parties from the beginning is on trying to persuade the mediator that their view is the right one. This in turn detracts from the

¹⁹⁶ Baxter also acknowledges that: "Obtaining a settlement is generally not what we [Inland Revenue] are looking for" during the conference phase. Baxter further highlights that the main value of the conference phase "can be that everything's on the table [and] everything's fully understood [by the parties].": Video conference with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue, Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013.

¹⁹⁷ Note that, as with the existing conference phase, the conference meeting may or may not be facilitated.

¹⁹⁸ The word 'agreement' in this context is not limited to full agreement. That is, where a dispute involves a number of different issues, agreement may be reached at the conference phase on some of these issues while others remain in dispute. Only those issues which remain unresolved would be eligible to continue on to the second step of the ADR stage.

¹⁹⁹ That is, in instances where the taxpayer accepts Inland Revenue's offer for conference facilitation and subsequently proceeds to mediation if the disputed issue(s) remain unresolved, then the same independent mediator would conduct both the facilitated conference and the mediation. In an ideal world, independent mediators would be utilised for all facilitated conferences, even in instances where it is clear that the parties will not be proceeding to mediation. However, given cost and resource constraints, in instances where it is clear that the parties will not be proceeding to mediation, it may be more feasible that these facilitated conferences are conducted by an internal Inland Revenue facilitator as in the existing conference facilitation process.

effectiveness of the mediation process. As noted in Chapter 3, Section 3.4, the ability for the mediator to make a recommendation on the dispute (thus adopting an evaluative role) would suggest that specialist tax knowledge would be required in order to evaluate the dispute. This would appear to be inconsistent with the earlier finding in this study that the focus group participants regarded it to be more important for the mediator to be a skilled and qualified mediator (with some subsequent training in tax) than for the mediator to be a tax expert (that is, to have specialist tax knowledge).

As stated earlier, it would be standard Inland Revenue practice to offer taxpayers mediation for unresolved issues following the conference phase. However, the findings of this study also indicate that certain types of disputes may not be suitable for mediation (as shown in Table 8.1). The focus group participants generally endorsed the types of disputes originally outlined by Jone and Maples (2012b) as not being suitable for mediation. The focus group further extended Jone and Maples' (2012b) list of disputes, namely, to include: disputes involving certain cases of tax avoidance; disputes for which evasion is being considered for a particular taxpayer; and certain disputes involving vexatious litigants, as not being suitable for mediation.

While the survey questionnaire findings showed that less than half of the survey respondents indicated that they either strongly agreed or agreed that mediation should occur only once in the mediation process (see Table 6.9), it is consistent with the original objectives of the Richardson Committee (1994) of dealing with disputes over tax liability efficiently and expeditiously, that the mediation phase occurs only once in the dispute resolution procedures. This aspect of the regime also stands to prevent mediation potentially being used as a

delaying tactic and encourages parties to make a genuine attempt to resolve the dispute at mediation.

The findings from the focus group discussion indicated that a limit should also be placed on the number of mediation sessions in the mediation phase for the purpose of achieving time and cost efficiencies in the disputes process. The focus group participants suggested that a general limit of two sessions would be reasonable for the mediation phase given that the parties would have already exchanged material information relating to the dispute in the conference phase (in addition to exchanging the NOPA and NOR).²⁰⁰ Again, a limit to the number of mediation sessions would encourage parties to genuinely engage in resolving the dispute. However, in line with the comments made by some of the focus group participants, it is suggested that further mediation sessions should be allowed for if there is an identified benefit made by the parties.²⁰¹

As with Inland Revenue's current conference meetings, the format of the mediation sessions need not be limited to face-to-face meetings. As noted by the focus group participants, the parties to a dispute may agree to hold a telephone or video conference where it is more convenient to and/or for the purpose of achieving cost and time efficiencies.²⁰² The cost of

²⁰⁰ The research findings indicate that, anecdotally, there is generally only one (or occasionally, two) conference meeting(s) between taxpayers and Inland Revenue. If the mediation phase were to be integrated with the conference phase, for the purpose of achieving time and cost efficiencies, in the researcher's view, it would be feasible to suggest that the conference phase should generally be limited to one meeting. Although, as indicated above, in certain circumstances some disputes may require more than one conference meeting and in such cases it is suggested that allowances should be made for further meetings. It should also be noted that in the current conference phase the decision to hold further meetings is decided between the parties. However, a judgement call by the facilitator may need to be made if there are no identified benefits in holding further meetings.

²⁰¹ However, in some instances this may require a judgement call to be made by the mediator. For example, if a taxpayer wishes to hold a further mediation session, but acknowledges that there are no new issues to discuss, then this may indicate delay.

²⁰² With respect to Inland Revenue's current facilitated conferences, 95 per cent are conducted face-to-face, 3 per cent by phone conference and 2 per cent by video conference. Inland Revenue are currently exploring the feasibility of expanding the frequency of video conferences for the purpose of achieving cost efficiencies.:

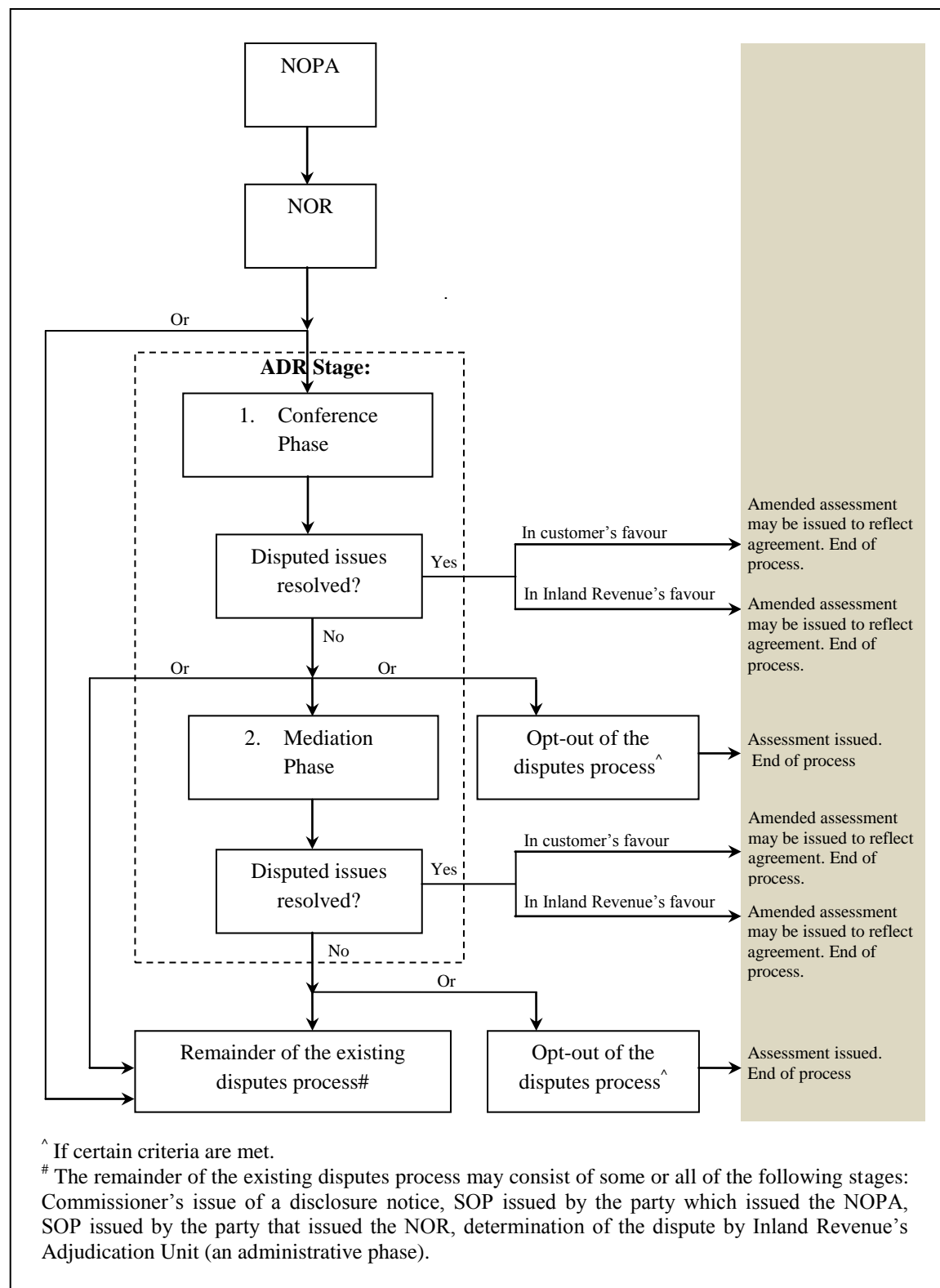
providing the mediation services, that is, the costs of administering the service, providing the mediator and providing a venue (where applicable), will be met by Inland Revenue. However, the taxpayer disputant(s) will be responsible for meeting additional costs such as those relating to representation and advice obtained. The research findings indicate that these aspects are consistent with mediation practice in other areas such as ACC, real estate and telecommunications. Similarly, Inland Revenue's facilitated conferences are currently provided at no cost to the taxpayer.

The refined proposed mediation phase included as part of the current New Zealand tax disputes resolution procedures is shown in diagrammatic form in Figure 8.1.²⁰³

Video conference with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue, Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013. Similar considerations may also be relevant in relation to the refined proposed tax mediation regime, although, taking into account whether the video conference format could potentially (adversely) impact on the dynamics of the mediation.

²⁰³ Figure 8.1 is based on Inland Revenue's flowcharts in: *Disputing an assessment: What to do if you dispute an assessment* (see Inland Revenue "IR 776", above n 15, at 13) and *Disputing a notice of proposed adjustment: What to do if Inland Revenue disputes your assessment* (see Inland Revenue "IR 777", above n 15, at 12). Figure 8.1 generally applies for both disputes commenced by the Commissioner and disputes commenced by a taxpayer.

Figure 8.1: New Zealand Tax Disputes Resolution Process Incorporating the Refined Proposed Mediation Phase



Generally, for disputes remaining unresolved following the NOPA and NOR stages of the existing disputes resolution procedures, the proposed administrative ADR stage will follow.

If no (or only partial) agreement is reached after the first step of the ADR stage (the conference phase), as in the existing procedures, taxpayers may continue on to the next stage of the disputes procedures (the Commissioner's issue of a disclosure notice and the exchange of SOPs) or if certain criteria are met, opt out of the disputes process and proceed to litigation. With the incorporation of mediation in the disputes procedures, there is now an additional option for taxpayers. That is, to proceed to the second step of the ADR stage (the mediation phase) in attempt to achieve a mediated resolution to the dispute.

Accordingly, on the basis that no (or only partial) agreement has been reached in the conference phase, it would constitute normal Inland Revenue practice to offer taxpayers' mediation as the final (or second) step of the ADR stage²⁰⁴ (that is, after taking into account the fact that some disputes may not be suitable for mediation).²⁰⁵ If no (or only partial) agreement is reached following the mediation phase, as in the existing conference phase, taxpayers can continue on to the disclosure notice (issued by the Commissioner) and SOPs stage of the disputes procedures or will have the option to opt out of the disputes process and proceed to litigation if certain criteria are met.²⁰⁶ That is, where agreement is unable to be

²⁰⁴ As part of the agenda for the conference phase, both parties should discuss the available options for continuing with the dispute (including mediation) if no agreement (on some or all of the issues in dispute) is reached at the end of the conference.

²⁰⁵ It is beyond the scope of this study to consider Inland Revenue's internal procedures for determining which disputes would not be suitable for mediation. However, it is acknowledged that there could be potential adverse impacts on taxpayers' perceptions of fairness of the disputes resolution procedures if the ultimate determination of disputes that are deemed unsuitable for mediation is being made solely by Inland Revenue.

²⁰⁶ It is not the purpose of this study to consider the criteria for opting out of the remainder of the disputes process following the mediation phase. Issues such as whether the same opt out criteria as for the conference phase should apply for the mediation phase, whether any modifications to the existing opt out criteria following the conference phase should be made and if so, whether the modifications would consequently impact on the utilisation of mediation, are beyond the scope of this study.

reached at mediation on some or all of the issues in dispute, the use of mediation will not affect taxpayers' rights to utilise the remainder of the existing disputes resolution procedures or to opt out of the process and proceed to litigation (where certain criteria are met), for those issues which remain unresolved.

While it is acknowledged that, for some taxpayers, mediation potentially adds an additional step to the disputes procedures, mediation can provide an opportunity for taxpayers and Inland Revenue to resolve tax disputes without resorting to litigation. Where the two parties are able to resolve a dispute at the mediation phase, both parties will benefit by avoiding the time and costs associated with completing the remainder of the statutory disputes process and potential litigation. Furthermore, the findings from this study suggest that although mediation might not necessarily result in agreement between the parties, it could result in the situation where the parties go away and rethink their positions and say: "I won't carry on with this dispute" (thus, resulting in the conclusion of the tax dispute). This was perceived by the research participants as also being a successful outcome from mediation and indeed a better outcome than parties being "burnt off" by the disputes procedures. The findings of this study indicate that, particularly for small taxpayers, mediation can provide the opportunity for taxpayers to put their cases forward and to feel as though they have been heard. This is of importance given that the majority of tax disputes in New Zealand involve small taxpayers and it would also suggest that the option of mediation could potentially be utilised by a large number of these taxpayers and have resulting positive impacts on taxpayers' perceptions of fairness and on voluntary compliance.

The estimated timeframe for the mediation phase was not an aspect of the mediation regime that was addressed by the research participants in this current study. However, as stated

earlier, it is believed that there would be overall time savings to parties (over completing the remainder of the existing disputes procedures) if the mediation phase results in an agreement (or otherwise results in parties reconsidering their positions and deciding not to continue with the dispute). Possible guidance with respect to the timeframe for the mediation phase can be sought from overseas tax authorities which currently utilise forms of tax mediation in their tax disputes resolution procedures. For example, HMRC's (2011, p 1) documentation on its ADR process for SMEs and individuals states that HMRC aim to notify its customers "normally within 30 days" as to whether their request for ADR has been successful.²⁰⁷ If a customer's request for ADR has been accepted, HMRC (2011, p 2) state that "the dispute usually takes less than two months to either resolve or reach a stage where both parties agree to differ." This indicates an overall timeframe of approximately three months commencing from the customer's initial request for ADR. Notwithstanding the differences in the tax administrations and the tax dispute resolution processes of the UK and New Zealand, in the researcher's view, it would be reasonable to suggest an estimated timeframe of three months for the refined proposed New Zealand tax mediation regime.²⁰⁸ This is also consistent with the timeframe for the mediation phase originally suggested by Jone and Maples (2012b).

²⁰⁷ Note that the proposed refined tax mediation regime for New Zealand differs from HMRC's ADR process for SMEs and individuals in the respect that mediation will be offered to taxpayers as part of standard Inland Revenue practice for unresolved issues following the conference phase, whereas HMRC's ADR process is provided on the request (application) of the taxpayer. Arguably, the provision of mediation only on the request of the taxpayer could potentially result in a lower level of utilisation of mediation (depending, amongst other factors, on the effectiveness of the promotion of mediation).

²⁰⁸ The three month timeframe would commence from the conclusion of the conference phase. The timeframe would, inter alia, be dependent on the number and availability of mediators for the refined proposed New Zealand tax mediation regime. In addition, similar to the current conference phase of the tax disputes procedures, the actual timeframe would be subject to the "facts and complexities of the specific case." See Inland Revenue "SPS 11/05", above n 14, at 31, [154] and Inland Revenue "SPS 11/06", above n 14, at 67, [185].

8.4 Other Issues

This section discusses other aspects of the refined proposed tax mediation regime (that is, aspects in addition to the initial suggested key features of Jone and Maples' (2012b) proposed tax mediation regime as outlined in Table 4.1) which were raised by the research participants, including: cost and resource constraints; aspects pertaining to shortfall penalties and debt remission; the number of people at mediation and people with authority to settle at mediation; and issues regarding Inland Revenue cultural changes. In addition, selected aspects relevant to the refined regime which have been raised in the prior literature are discussed, including: the ability and willingness of parties to settle; and aspects relating to the implementation and promotion of the refined proposed tax mediation regime.

8.4.1 Resource and Cost Limitations

The findings of this study indicate that a potential barrier to the implementation of tax mediation is the number of "properly trained" tax mediators that would be available for the potential number of tax dispute cases that choose to utilise mediation (Tax lawyer 2). However, as noted in Chapter 7, Section 7.3.3, this limitation was initially raised on the assumption made in Jone and Maples' (2012b) proposed New Zealand tax mediation regime that the panel of mediators would comprise of specialist tax practitioners trained in mediation (of which there would be a relatively limited number), rather than the reverse scenario of a panel of qualified mediators trained in tax which was subsequently suggested by the research participants. Arguably, there would be a greater number of qualified mediators who are subsequently trained in tax than specialist tax practitioners subsequently trained in mediation, which would be potentially available to mediate tax disputes. In addition, given that the refined tax mediation regime proposes that the mediator will have a purely facilitative role

and will not have the ability to make a recommendation on the dispute, the mediator would generally not be required to be a specialist in tax law.

Given Inland Revenue's budgetary constraints and existing allocations of its funding, the ability of Inland Revenue to provide a fully-funded mediation service to taxpayers also presents a major limitation to mediation being employed within the current disputes procedures. Although, as previously noted, it is expected that mediation, if successful, would provide some cost savings in terms of avoiding the additional expenses of pursuing the disputes process further and potential litigation costs for both Inland Revenue and the taxpayer.

8.4.2 Shortfall Penalties and Debt Remission

The tax practitioners in the focus group noted that in most disputes with the Commissioner there is a punitive element in terms of shortfall penalties and how the proposed mediation regime would operate in conjunction with the imposition of shortfall penalties was believed to be a "fundamental problem in terms of mediation being able to work" (Tax lawyer 1). Section 94A of the TAA 1994 mandates that the imposition of a shortfall penalty must follow the same assessment process, and is therefore subject to the same statutory disputes procedure, as the underlying tax that gave rise to the shortfall. The Commissioner may not simply impose a shortfall penalty, but must generally issue a NOPA proposing the penalty, unless an exception (to the requirement that a NOPA be issued) under s 89C TAA 1994 applies.²⁰⁹ However, Keating (2012, p 101) notes that:

²⁰⁹ SPS 11/05 also confirms this approach: "Where there is sufficient evidence to suggest that shortfall penalties should be imposed, the relevant Inland Revenue officer must ensure that the shortfall penalties are proposed in the same NOPA as the substantive issues.": Inland Revenue "SPS 11/05", above n 14, at 24, [78]. However, the NOPA will not include a proposed shortfall penalty if one of the exceptions outlined in SPS 11/05 apply: see *ibid*, at 24, [78(a)-(d)].

Some taxpayers have questioned the appropriateness of proposing shortfall penalties when the underlying core tax dispute remains unresolved. In effect, taxpayers contend that it is not possible for the Commissioner to adequately determine either the amount of the tax shortfall or the reason for it when the correctness of the taxpayer's position has yet to be determined.

In the context of the current conference phase, Inland Revenue acknowledge that where there is "discussion about the underlying tax and it eventuates that there is a liability, shortfall penalties are addressed as part of that process" if applicable.²¹⁰ The rationale for this being that Inland Revenue "don't want to start [a dispute] again on the penalty."²¹¹ It follows that in instances where shortfall penalties are an applicable item of discussion in terms of the refined proposed mediation regime, in the researcher's view, they would be addressed in a similar manner as to how shortfall penalties are considered in the current conference phase.²¹² Also based on the current conference phase, any shortfall penalties which are concluded at mediation would be authorised by Inland Revenue officers with the requisite delegated authority.²¹³

²¹⁰ This would involve an assessment of the culpability of the taxpayer being made by Inland Revenue. Video conference with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue, Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013.

²¹¹ Video conference with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue, Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013.

²¹² Coleman and Trombitas observe that: "the IRD generally seeks to impose the highest penalties at the start of a dispute, and then work their way down the chain if their claims are successfully resisted by the taxpayer, although the Commissioner has been willing to compromise in relation to penalties where settlement occurs: see for example *Accent Management v CIR* (2007) 23 NZTC 21,366."; Coleman and Trombitas, above n 183, at 81.

²¹³ In terms of the conference phase, Baxter states that: "Different categories of shortfall penalty have different delegations and for some at the high end there is an independent review also required. Therefore, the team leader would normally have the delegated authority but not always."; Personal correspondence with Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland, 17 May 2013. Baxter further emphasises that the Inland Revenue facilitator is separate from the Inland Revenue officer holding the delegated authority. Moreover, the facilitator has no decision-making role in relation to the dispute. In terms of the refined proposed tax mediation regime, obviously the mediator would be separate from the Inland Revenue officer with the delegated authority and the mediator would have no decision-making role in relation to the dispute.

In addition, the focus group participants (in Chapter 7, Section 7.3.2) noted that a number of disputes going through the proposed mediation phase potentially would involve the remission of debt (including the remission of penalties and interest). Regarding this matter, in the context of the conference phase, Inland Revenue highlight that: “the disputes from our perspective are really [about] establishing a liability in the first place” as opposed to being about the discussion of payment options.²¹⁴ However, Inland Revenue also state that: “it may become apparent that the real reason the person is disputing the tax is because they can’t pay it and then we discuss the payment options with them.”²¹⁵ In the researcher’s view, the above points would similarly apply to the refined proposed tax mediation regime.

8.4.3 Number of People at Mediation and People with Authority to Settle at Mediation

The focus group discussion indicated that the number of people present at a mediation would be dependent on the issue(s) in dispute. The findings also suggest that having fewer people at a mediation is not necessarily better as the ‘right’ people are required at mediation in order to provide the information and make the decisions. The participants noted that it was the mediator’s role, in part, to address any power imbalances that could arise from having large numbers on one side and small numbers on the other. Furthermore, if mediation was to be utilised as part of standard Inland Revenue practice, the potential for having a large number of representatives from Inland Revenue present at a mediation may be restricted due to the associated resource limitations. The findings from the focus group also indicated that ideally people with the requisite authority to settle disputes should be personally present at

²¹⁴ Video conference with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue, Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013.

²¹⁵ Video conference with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue, Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013.

mediation.²¹⁶ However, in instances where this is not possible, it is important that there are procedures in place so that those with requisite authority can be accessed promptly (for example, by either video or by phone).

8.4.4 Culture Change of Inland Revenue

The research findings suggest that mediation would require a change in the culture of Inland Revenue towards a dispute resolution culture such that it would constitute standard Inland Revenue practice to offer taxpayers mediation for unresolved issues following the conference phase (even though it is not legislated for).²¹⁷ If this were the case then the onus would be on the taxpayer to be receptive to both utilising the mediation option and genuinely engaging in the mediation process itself. The researcher suggests that the implementation of mediation should be accompanied by the establishment of an ‘ADR unit’ within Inland Revenue which would inter alia be responsible for overseeing the provision of mediation.²¹⁸ Consistent with the literature on the service paradigm of tax administration, the findings of this study suggest that the provision of mediation by Inland Revenue could essentially be viewed as a service provided by Inland Revenue aimed at, amongst other things, building a better relationship between the tax authority and taxpayers. Regardless of the outcome of the mediation, taxpayers should be appreciative of mediation being provided as a cost-free service. The

²¹⁶ This is consistent with the view expressed by Baxter in respect of Inland Revenue’s facilitated conferences: “If the discussions are looking like compromise, looking like settlement, then we would prefer that the manager is there so that they are part of that process.”: Video conference with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue, Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013.

²¹⁷ In addition, the researcher suggests that the availability of mediation as a possible option for resolving tax disputes could be outlined to the taxpayer early on, for instance, incorporated in information guides provided to the taxpayer during Inland Revenue audits. See, for example, Inland Revenue *Inland Revenue audits: Information for taxpayers* (IR 297, Wellington, February 2012b).

²¹⁸ This is in line with other tax authorities which provide forms of ADR, including mediation, to taxpayers, such as HMRC’s Dispute Resolution Unit, who have over-arching responsibility for dispute resolution in HMRC. See HM Revenue and Customs, above n 70, at 26. However, it is beyond the scope of this study to consider the details of the suggested Inland Revenue ADR unit.

literature would further suggest that this should act to enhance taxpayers' perceptions of fairness and thereby voluntary compliance.

8.4.5 Willingness and Ability to Settle

In order for mediation to work, both parties must have the willingness and ability to settle and indeed to compromise. When negotiating a settlement with Inland Revenue, a taxpayer would normally be expected to act in their own rational self-interest: the taxpayer will enter into a negotiated settlement when they consider it is in their economic interest to do so. In a discrete dispute (that is, as defined by Campbell and Hendriksen (2012, para 10.5), "where there is no dispute or other interaction with Inland Revenue in the foreseeable future that may be affected by the taxpayer's conduct in the current dispute"), this will usually involve weighing up the amount to be paid under the settlement against the direct and indirect costs of pursuing the dispute through adjudication and litigation, the risk of losing any litigation and the amount of tax (including shortfall penalties and UOMI that he or she will otherwise be willing to pay).

On the other hand, while Inland Revenue does take into account its economic self-interest in negotiating a settlement,²¹⁹ this is not its exclusive motivation in deciding whether or not to settle. In this sense Inland Revenue is not an economically rational actor. As noted in Chapter 2, Section 2.4, ss 6 and 6A of the TAA 1994 charge Inland Revenue with the care and management of the tax system and these sections cite several considerations that Inland Revenue needs to weigh up in discharging this duty that can have a direct effect on whether or not it will settle, including having regard to: the importance of promoting compliance,

²¹⁹ To the extent that the duty imposed on the Commissioner by s 6A(3)(a) of the TAA 1994 to collect over time the highest net revenue practicable within the law having regard to the resources available can be equated with making a rational decision based on economic self-interest.

especially voluntary compliance with the Inland Revenue Acts (s 6A(b) TAA 1994); and the compliance costs incurred by taxpayers (s 6A(c) TAA 1994).

In the exercise of the Commissioner's managerial discretion in the context of his or her care and management responsibilities, the Commissioner has a broad power to enter into compromises where that course is consistent with his or her duty under ss 6 and 6A TAA 1994. However, as noted in Chapter 2, Section 2.4, while negotiated settlement with Inland Revenue is possible during the pre-litigation disputes process, in practice it rarely occurs (Maclaren and Keating, 2009). Furthermore, an apparent lack of transparency in respect of Inland Revenue's policy regarding settlement has been the subject of much commentary and criticism (Campbell and Hendriksen, 2012). If mediation were to be incorporated within the New Zealand tax disputes procedures, then arguably this would require a fundamental change in the way the Commissioner exercises his or her managerial discretion with respect to entering into settlements (prior to litigation) as well as the establishment of clear policy and procedures regarding settlement at the earlier stage of disputes.

8.4.6 Implementation and Promotion

Although this aspect was not addressed by the research participants in this study, following the approaches taken by HMRC and the ATO who have recently implemented (or in the case of the ATO, are currently trialling) ADR processes within their tax disputes procedures,²²⁰ the researcher suggests that Inland Revenue should initially trial or pilot test the refined proposed New Zealand tax mediation regime on a limited number of cases in order to test and evaluate its effectiveness before implementing the mediation regime at full-scale. The practices of overseas tax authorities indicate that pilot tests can focus on the size of the

²²⁰ See above n 64.

taxpayer (for example, SMEs and individuals or large businesses) (HMRC, 2012b) or tax type (for example, GST, excise, fuel tax credits, luxury car tax and wine equalisation tax) (ATO, 2012a). Taxpayer participation in these pilots is voluntary and participation can either be by invitation (ATO, 2012a) or on the application of the taxpayer (HMRC, 2012b). As noted in Chapter 2, Section 2.2, given that the majority of tax disputes in New Zealand involve taxpayers with disputes of small amounts, the researcher suggests that Inland Revenue could initially pilot test mediation on a selected number of taxpayers with disputes below a certain threshold. Participation in the pilot could be by invitation to a certain number of taxpayers meeting the required criteria.²²¹

The promotion of tax mediation amongst taxpayers by Inland Revenue was also another aspect that was not considered by the research participants. As noted by Jone and Maples (2012b), the extant literature suggests that a significant barrier to the use of tax mediation is a general lack of knowledge and understanding of tax mediation amongst taxpayers (NADRAC, 2009a). The literature further suggests that an increased awareness of tax mediation needs to be driven in part by the adequate promotion of tax mediation by tax authorities (Parsly, 2007; NADRAC 2009a). The piloting of tax mediation by Inland Revenue would act as an initial promotion of tax mediation amongst taxpayers. However, as suggested by Jone and Maples (2012b), further information campaigns aimed at educating taxpayers and their advisors on tax mediation may be also necessary to encourage the use of tax mediation.²²²

²²¹ It is beyond the scope of this study to outline the criteria that would be required to participate in the Inland Revenue tax mediation pilot test.

²²² It is beyond the scope of this study to consider the details of such information campaigns. For a general discussion on increasing public and professional awareness of ADR, see National Alternative Disputes Resolution Advisory Council *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General* (Barton, 2009b) <<http://www.nadrac.gov.au/publications>> at ch 4.

8.5 Summary

This chapter has outlined the refined proposed tax mediation regime for New Zealand through synthesising the research findings from the survey questionnaire and the focus group interview. The findings suggest that the most important aspect of the refined tax mediation regime is the provision of independent mediators that are foremost trained and skilled in mediation (rather than being tax specialists). It is proposed that the refined tax mediation regime should be incorporated with the current conference phase as part of a proposed ADR stage of the disputes procedures. This chapter also discusses a number of additional aspects relating to the refined proposed tax mediation regime, including: cost and resource constraints; aspects regarding shortfall penalties and debt remission; the number of people at mediation and people with authority to settle at mediation; Inland Revenue culture change issues; the willingness and ability of parties to settle; and aspects relating to the implementation of the refined proposed tax mediation regime, including pilot testing and promoting the regime. Despite the various limitations identified, the research findings suggest that mediation could potentially benefit the majority of (small) taxpayers as even if the purpose of early and efficient dispute resolution is not achieved, mediation can at least allow taxpayers to put their cases forward and provide them with an opportunity to reconsider their positions. The next chapter outlines the conclusions, limitations of the study and areas for further research.

Chapter 9

Conclusions, Limitations and Future Research

9.1 Introduction

This chapter presents the conclusions of the thesis and is organised as follows. Section 9.2 summarises the purpose of the study and then outlines the main findings and conclusions drawn from the research. The contribution of the thesis to the literature and the implications of this study for the tax authority and other parties are discussed in Sections 9.3 and 9.4, respectively. Limitations of the study and areas for future research are then addressed in Section 9.5.

9.2 Conclusions

9.2.1 Purpose

The purpose of this study was to refine the features of Jone and Maples' (2012b) proposed New Zealand tax mediation regime in order to develop a refined proposed tax mediation regime for New Zealand. This study has obtained feedback on Jone and Maples' (2012b) proposed New Zealand tax mediation regime from selected practitioners with experience and/or knowledge in the tax disputes resolution or mediation fields. As outlined in Chapter 5 this study has employed a sequential mixed methods approach comprising of a quantitative component of a survey questionnaire followed by a qualitative component of a focus group interview. An initial descriptive statistical analysis of the survey questionnaire findings (presented in Chapter 6) provided the basis for the features of the proposed mediation regime to be explored in more depth in the focus group interview. The subsequent findings from the focus group discussion (presented in Chapter 7) were used to inform and enrich the survey

questionnaire findings, with the resulting refined proposed tax mediation regime outlined in Chapter 8.

The next two sections discuss the main findings of this study, firstly in relation to Jone and Maples' (2012b) proposed New Zealand tax mediation regime (Section 9.2.2) and secondly, in comparison to Inland Revenue's current facilitated conferences (Section 9.2.3).

9.2.2 The Refined Proposed Regime and Jone and Maples' (2012b) Proposed Regime

The refined proposed New Zealand tax mediation regime differs from Jone and Maples' (2012b) initial tax mediation regime in a number of important respects. Unlike in Jone and Maples' (2012b) proposed regime, mediation will not be prescribed in legislation, but will constitute an administrative phase of the disputes procedures. Mediation will not be mandatory as this study recognises that some parties may not find mediation useful and certain types of tax disputes by their nature are not suitable for mediation.

The findings from this study reveal that a critical feature to the refined mediation regime is the presence of an independent mediator and furthermore, that the mediator is trained and skilled in mediation rather than being a tax specialist. The refined regime proposes that the mediator is from an independent organisation of mediators such as AMINZ or LEADR (who would be responsible for ensuring that the mediators on their panels had met a required level of tax training for conducting tax mediations). This is distinct from a mediator who is a specialist tax practitioner (for example, a tax lawyer or tax accountant), who is then trained in mediation, as initially suggested by Jone and Maples (2012b). Given that the panel of

mediators will be provided by an independent organisation, the refined regime proposes that parties will not have the option of engaging a private mediator.

The refined regime suggests that the mediation phase should occur after the existing conference phase of the disputes procedures as opposed to replacing the conference as suggested by Jone and Maples (2012b). It is proposed that mediation would constitute the second step of a proposed ADR stage of the disputes procedures. The existing conference phase would constitute the first step of the ADR stage and on the basis that no agreement is reached (on some or all of the issues in dispute) at the end of the conference phase, mediation would be offered to taxpayers as part of standard Inland Revenue practice, as the second step of the ADR stage. This feature of the refined regime comes from the research finding that the conference phase was viewed by the focus group participants (and also reflected in a number of comments to the survey questionnaire), as being a necessary part of the disputes process in order for parties to become more aware of each other's positions before proceeding to mediation. That is, it was perceived that the mediation process would be more difficult without having the conference phase first.

In line with the original objectives of the Richardson Committee (1994) of achieving the efficient and expeditious resolution of tax disputes, the refined regime proposes that the number of mediation sessions will generally be limited to two sessions (as opposed to imposing no limit to the number of sessions as in Jone and Maples' (2012b) proposed regime). It was thought that a limited number of mediation sessions would promote parties to genuinely engage in the mediation process in attempt to resolve the dispute and also avoid the potential for the mediation phase to being drawn out by parties.

Following the views of the mediation experts in this study, the refined regime proposes that the mediator will adopt a facilitative role only and will not have the ability to make a recommendation on the dispute at the request of the parties as in Jones and Maples' (2012b) proposed regime. The findings of this study indicate that the success of a mediation should not necessarily be measured by whether an agreement has been reached between the parties. Even if the parties do not reach an agreement at the end of mediation, it can still be regarded as successful if the mediation process assists parties to reconsider their positions and they consequently decide not to carry on with the dispute (or with certain issues of the dispute). The adoption of a facilitative (rather than an evaluative) role by a skilled and trained mediator is an underlying element to this outcome occurring.

To ensure the success of the proposed tax mediation regime, this study suggests that the refined proposed New Zealand tax mediation regime should initially be piloted on a limited number of tax dispute cases in order to test and evaluate its effectiveness before being implemented on a full-scale basis. Moreover, as noted by Jones and Maples (2012b), the proposed tax mediation regime would need to be effectively promoted to taxpayers and their advisors in order to encourage the uptake of tax mediation in New Zealand. It is suggested that further guidance on these aspects of the refined proposed mediation regime could be sought from the approaches taken by overseas tax authorities such as HMRC and the ATO, in addition to drawing from Inland Revenue's own experiences with respect to the implementation of facilitated conferences.

9.2.3 Mediation and Facilitated Conferences

In the light of the apparent positive feedback on Inland Revenue's existing conference facilitation process, the value of the refined proposed tax mediation regime as another step in the disputes resolution process in addition to facilitated conferences may inevitably be called into question. The important distinction to note between the refined proposed tax mediation regime and the existing facilitated conferences is the presence of an independent mediator rather than an internal Inland Revenue facilitator. The research findings indicate that an independent mediator was viewed as an important element in enhancing taxpayers' fairness perceptions and engagement in the process. Furthermore, the findings from this study highlight the importance of having a trained and skilled mediator in the process and moreover, in the context of the current facilitated conferences, Inland Revenue acknowledge the importance of the "soft skills" required by the facilitator: "not everybody who's a good [tax] technician is necessarily going to be a good facilitator ... we do recognise that it is an interactional role."²²³ It is arguable whether two days of specific training on the role in conjunction with conducting two to three facilitations per year (as noted in Chapter 2, Section 2.3.2) would be sufficient enough for the selected internal Inland Revenue staff to further develop their existing "soft skills". It follows that, with respect to the refined proposed tax mediation regime, an independent trained and skilled mediator from AMINZ or LEADR is clearly a more favourable option (from the taxpayers' perspective) rather than utilising an internal Inland Revenue member of staff. In addition, the selection of the mediator by an organisation independent of Inland Revenue was highlighted by the research participants as a formality which further reinforces the independence of the mediator both in actuality and in perception.

²²³ Video conference with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue, Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013. Compare with above n 188, in the context of mediation.

However, one might recognise that this study suggests that if the refined proposed tax mediation regime were to be implemented, then ideally the same independent mediator would conduct both the facilitated conference and the mediation. It follows that the value (and necessity) of mediation may still be questioned given that it is proposed that the facilitated conference would now be conducted by an independent mediator.²²⁴ It is therefore necessary to re-emphasise the difference in purpose between the conference phase and the refined proposed tax mediation regime: in instances where resolution cannot be reached on particular issues in the conference phase, the conference (whether facilitated or non-facilitated) can provide the opportunity for parties to clarify their respective positions on these issues. If parties can reach a common understanding of some of the issues in dispute, then this will hopefully allow them to progress with the dispute on a more informed basis. As a possible next step, mediation then offers parties the opportunity to reach a genuine negotiated settlement having already gained an insight into each other's positions during the conference phase.²²⁵ In sum, the focus of the conference phase is more on the understanding of the parties' positions, while the focus of mediation is on genuinely attempting resolution of the dispute. It is also important to reiterate the point highlighted in Chapter 1, Section 1.1, that it has been explicitly stated that it is not the purpose of the current facilitated conference to find a "mediated settlement", but rather it is to exchange material information relating to the dispute (Griffiths, 2012a, p 11).

²²⁴ One possible consequence of the presence of an independent mediator rather than an internal Inland Revenue facilitator in facilitated conferences is that a higher rate of resolution of issues during the conference phase could potentially be achieved.

²²⁵ However, it may become apparent during the conference phase that parties hold strong and divergent opinions as to the correct application of the law such that it is clear the two sides will not agree. In the face of such disagreement it may be in the parties' interests to opt out of the remainder of the disputes process and proceed to court.

As noted in Chapter 2, Section 2.3.2, 59 per cent of cases that proceed to a facilitated conference are resolved through one party conceding or a compromise between the two parties.²²⁶ Through acting as an extension to the facilitated conference, mediation could potentially resolve a fair proportion of the remaining 41 per cent of cases that would have otherwise progressed on to the SOP stage of the disputes process (or in some circumstances, to litigation) under the existing procedures and correspondingly reduce the cost and time of these disputes. Hence, the benefit of mediation following the conference phase is that it potentially gives parties ‘another bite of the cherry’ in attempting the efficient (and cost effective) resolution of the dispute. This is in contrast with the present situation of taxpayers (especially small taxpayers) being “burnt off” because the costs of pursuing the full disputes process (and the potential costs of litigation) are too great (Ng and Cunniffe, 2013, p 79). Moreover, even if resolution is not achieved through mediation, it may still be able to act as a reality check for parties (with the assistance of an independent third party) and thus, give parties more realistic ideas about potential outcomes of the dispute. After mediation, the issues will almost certainly have been narrowed. Accordingly, if litigation is ultimately required, it will be on a much more focused basis than it would have been absent the mediation process.

Anecdotally, initial feedback on facilitated conferences has generally been positive from the point of view of both Inland Revenue and taxpayers.²²⁷ It follows that, if Inland Revenue and

²²⁶ However, it should be noted that, of the 59 per cent of cases that are resolved through compromise or concession, the proportion of these cases where the parties are truly satisfied with the outcome achieved is unknown.

²²⁷ Note that an initial feedback form surveying taxpayers utilising the conference facilitation option from when it was first implemented on 1 April 2010, was discontinued by Inland Revenue in 2011 after the Minister of Revenue announced a proposed ministerial review of the tax disputes procedures to take place in 2013.: Video conference with Chris Bond, Technical Advisor, Legal and Technical Support, Inland Revenue, Christchurch and Ross Baxter, Case Director, Investigations and Advice, Inland Revenue, Auckland on 30 April 2013. Statistics comparing the resolution rates of facilitated and non-facilitated conferences were unavailable to the researcher from Inland Revenue at the time of submission of this thesis.

taxpayers are able to approach mediation in a similar way to which they have adopted the conference facilitation feature, then arguably mediation has the potential to offer even further improvements to the conference phase. The overall aim would be to give the conference phase more substance by presenting a real opportunity to settle disputes without recourse to the courts. Furthermore, the findings of this study suggest that the provision of mediation as a cost-free service can potentially positively impact on taxpayers' perceptions of fairness of the operation of the tax system and this furthermore, aligns with the approach of Inland Revenue's Compliance Model in creating an environment that promotes voluntary compliance.

9.3 Contribution to the Literature

This study makes a number of contributions to the literature as outlined in this section. In drawing from the views of those with relevant expertise in the tax disputes resolution and mediation fields, this study may contribute towards "enrich[ing] taxation research by the adoption of the perspectives of more than one academic discipline" (Lamb, 2005, p 7). This study adds to the limited extant literature pertaining to the use of mediation in the area of tax disputes resolution in countries around the world. As noted earlier, most of the prior literature in tax mediation emanates from the United States. This study is of international as well as national relevance, and may provide an avenue for future cross-country evaluations to be made in the area of tax mediation and/or complement any related studies of overseas jurisdictions in tax mediation.

This study adds to the research conducted by Jone and Maples (2012b) which culminated in a proposed tax mediation regime for New Zealand. Through obtaining feedback on their proposed New Zealand tax mediation regime from selected practitioners with experience

and/or knowledge in the tax disputes resolution or mediation fields, this study adds a practical perspective to the research of Jone and Maples (2012b). Given that the proposed New Zealand tax mediation regime has not yet been tried and tested in real life, this study provides a basis for further research and evaluation of tax mediation in New Zealand.

This study further contributes to the existing number of taxation studies incorporating both quantitative and qualitative orientations. The research literature indicates that the mixed methods approach can help one method address the weaknesses of another and provide a more complete answer to the research question (McKerchar, 2010). In addition, this research adds to the current body of taxation studies utilising the focus group method of inquiry. This study illustrates one of the main advantages of the focus group method, that is, focus groups can produce a rich and detailed set of data expressed in the participants' own words and context (Stewart *et al.*, 2007).

9.4 Implications for the Tax Authority and Others

The findings of this study may be of use to Inland Revenue and New Zealand policymakers in improving the operation of the current tax disputes resolution procedures in New Zealand. If appropriately used, mediation can potentially result in significant time and cost savings for both Inland Revenue and taxpayers. As noted earlier, the efficient operation of the tax disputes resolution process also has consequences for the tax system as a whole. A successful tax mediation regime can not only help parties to move away from adopting entrenched litigious positions and towards focusing on early dispute resolution outside of court, it may also help to improve taxpayers' perceptions of the tax disputes resolution procedures and thereby enhance voluntary compliance.

This study contributes towards addressing some of the various concerns raised by New Zealand commentators with respect to the current operation of the New Zealand tax disputes resolution procedures. Should the government's planned review of the tax disputes resolution procedures, as indicated by the Minister of Revenue, be released for external consultation and discussion later in 2013, this study potentially contributes relevant material towards the suggestions for changes to the disputes procedures put forward by commentators and professional bodies. Nevertheless, suggestions for improvements to the tax disputes resolution procedures are always desirable.²²⁸

This research contributes towards expanding the practice of mediation in the New Zealand context from non-tax areas into the area of tax disputes resolution. While it has been acknowledged that it is beyond the scope of this study to solve the various practical issues existing in the mediation field generally, this research potentially contributes towards current dialogue regarding the development of mediation policy and best practice in New Zealand.

This study also makes a contribution from a New Zealand perspective to a recent trend by tax authorities around the world towards utilising various forms of ADR as an alternative approach to resolving tax disputes before they reach litigation (Ernst & Young, 2010; IGT, 2011a). Notwithstanding that the findings of this study are specific to the tax disputes resolution procedures in New Zealand, this research may be of relevance to other jurisdictions which are currently trialling the use of various ADR processes in their tax disputes procedures, such as Australia.

²²⁸ Prior to the submission of this thesis, Sir Ivor Richardson viewed a summary of the purpose of this research and its findings. Echoing the original objectives of the Richardson Committee in 1994, Sir Ivor noted the "crucial importance" of a well-functioning tax disputes system in the administration of the New Zealand tax system.: Personal correspondence with Sir Ivor Richardson, retired President of the Court of Appeal, Wellington, 5 June 2013.

9.5 Limitations and Areas for Future Research

As in all research, there are limitations to this study that must be acknowledged. Limitations with respect to the research method are identified in Section 9.5.1 and limitations of the refined proposed New Zealand tax mediation regime are outlined in Section 9.5.2. Possible areas for future research are also suggested in each of these sections.

9.5.1 Limitations of the Research Method

The refined proposed New Zealand tax mediation regime resulting from this study constitutes only one possible version of a refined New Zealand tax mediation regime. Implicitly, a different refined tax mediation regime could have resulted had the views of a different group of practitioners or other stakeholders been sought. This study was limited to seeking the views of selected New Zealand practitioners with knowledge and/or expertise in tax disputes resolution or mediation. The absence of the views of Inland Revenue on Jone and Maples' (2012b) proposed tax mediation regime is acknowledged as a major limitation to this research. Despite attempts to obtain feedback from Inland Revenue staff on Jone and Maples' (2012b) proposed tax mediation regime being made, Inland Revenue declined to partake in both the survey questionnaire and focus group components of this study.²²⁹

Due to time and resource constraints, only one focus group was able to be conducted in this study. A further limitation was that the focus group participants consisted predominantly of tax practitioners and included only one mediation practitioner. This would have impacted on the particular dynamics of (and therefore, the findings from) the focus group. Future research would ideally incorporate a larger number of focus groups and attempt to include a more

²²⁹ As noted in Chapter 1, Section 1.2, feedback from Inland Revenue on the resulting refined proposed tax mediation regime was also not able to be obtained.

balanced mix of tax and mediation participants. The fact that all of the focus group participants in this study were from the Canterbury region also presents a limitation to this study given that tax practitioners from different regions in New Zealand would have different frames of views and experiences in relation to tax disputes with Inland Revenue.²³⁰ Focus groups conducted in several regions throughout New Zealand would therefore be another avenue for future research.

The tax and mediation practitioners selected for this study had much greater knowledge and experience in their respective areas of expertise than the researcher. It is acknowledged that there is the risk that the researcher may not have understood or interpreted the participants' responses fully in the analysis and reporting of the data.

9.5.2 Limitations of the Refined Proposed Tax Mediation Regime

As indicated earlier, a major limitation with respect to the refined proposed New Zealand tax mediation regime is the cost constraints on Inland Revenue in providing a fully-funded tax mediation service incorporating independent mediators. Budgetary constraints and existing allocations of Inland Revenue funding may preclude the implementation of the proposed tax mediation regime. In addition the number of qualified mediators in New Zealand that are both willing and available to mediate tax disputes could present a further limitation to the operation of the proposed tax mediation regime. Furthermore, it was beyond the scope of this study to outline the specific level of tax training (as well as aspects relating to the provision of the training and ongoing development) that would be required for mediators on the panels of AMINZ or LEADR. These are aspects that would require further consideration.

²³⁰ Note that, there are regional differences in the nature of taxpayers, the issues in dispute and the complexity of tax disputes. For example, anecdotally tax disputes in the Auckland region are more complex.

The implementation of the refined tax mediation regime would ideally need to be considered in conjunction with other changes to the existing New Zealand tax disputes resolution procedures (that is, as part of “a far-reaching review” of the disputes resolution procedures recommended by Griffiths (2012a, p 23)). However, it was beyond the scope of this study to consider the reform of the tax disputes resolution procedures as a whole. As the refined regime proposes that mediation should be integrated with the existing conference phase as part of a proposed ADR stage of the disputes procedures, future research could address the changes to the conference phase (including those raised in Chapter 8, Section 8.3) that would be required in order to successfully integrate the conference phase with mediation. In addition, future research could explore whether the proposed ADR stage could in fact occur earlier in the disputes process (for example, before the NOPA and NOR stage).

The research findings suggest that the operation of the refined proposed mediation regime would in part be dependent on a change in the culture of Inland Revenue towards a dispute resolution-focused culture such that it would constitute standard Inland Revenue practice to offer taxpayers mediation for unresolved issues following the conference phase (given that it is proposed that mediation will not be legislated for). In addition, with respect to Inland Revenue’s approach to settlement, a change in the culture of Inland Revenue staff towards proactively pursuing settlement prior to the litigation stage in appropriate cases would be required. Taxpayers would also need to be willing to utilise the mediation regime in resolving tax disputes. A related limitation to the use of the mediation regime may be that where there are more complex tax issues in dispute, parties may be more likely to decide to by-pass the mediation phase and proceed to litigation instead. It should also be noted that the incorporation of mediation as an additional step in the current tax disputes resolution process

could potentially increase the overall length (and cost) of the disputes procedures for some taxpayers and this possibility could detract from the use of the mediation process.

As indicated earlier in this study, mediation should not be considered as a panacea for resolving tax disputes and this study acknowledges that there are limitations to mediation as a method of resolving disputes generally. While some tax disputes will clearly not be able to be mediated, the findings of this study suggest that the refined proposed New Zealand tax mediation should benefit the majority of small taxpayers. If not achieving the purpose of the early and efficient resolution of tax disputes, mediation can at least offer small taxpayers the chance to put their views forward and feel as if they have been heard, as well as providing them with an opportunity to reconsider their positions. To this end, this study generates scope for the further development of the tax mediation application in New Zealand.

References

Aberbach JD and Christensen T “The challenges of modernizing tax administration: Putting customers first in coercive public organizations” (2007) 22 Public Policy and Administration 155.

Accent Management Ltd v Commissioner of Inland Revenue [2007] NZCA 231, (2007) 23 NZTC 21,366.

Alexander N *Global Trends in Mediation* (2nd ed, Kluwer Law International BV, The Netherlands, 2006).

Alfini J and Clay GS “Should lawyer-mediators be prohibited from providing legal advice or evaluations?” (1994) 1(1) Dispute Resolution Magazine 8.

Allingham MG and Sandmo A “Income tax evasion: A theoretical analysis” (1972) 1 Journal of Public Economics 323.

Alm J and Martinez-Vazquez J “Institutions, paradigms, and tax evasion in developing and transition countries” in J Alm and J Martinez-Vazquez (eds) *Public Finance in Developing and Transition Countries* (Edward Elgar Publishing, Cheltenham, 2003) 147.

Alm J, Cherry T, Jones M and McKee M “Taxpayer information assistance services and tax compliance behavior” (2010) 31 Journal of Economic Psychology 577.

Alm J and Torgler B “Do ethics matter? Tax compliance and morality” (2011) 101 Journal of Business Ethics 635.

Arbitration Act 1996.

Attorney-General v Steelfort Engineering Co Ltd [1999] NZCA 18, (1999) 1 NZCC 61,030.

Auckland Gas Co Ltd v Commissioner of Inland Revenue [1999] 2 NZLR 409, (1999) 19 NZTC 15,027 (CA).

Australian Taxation Office *Code of Settlement Practice* (2007a) <<http://www.ato.gov.au/>>.

Australian Taxation Office “Practice Statement Law Administration 2007/23” (2007b) <<http://www.ato.gov.au/>>.

Australian Taxation Office “Introduction to the Compliance Model” (2009) <<http://www.ato.gov.au/>>.

Australian Taxation Office “ADR facilitation pilot – overview” (2012a) <<http://www.ato.gov.au/>>.

Australian Taxation Office *Compliance Program 2012-13* (Canberra, 2012b).

Australian Taxation Office “Guide to correcting mistakes and disputing decisions: Decisions you can object to, and time limits” (2012c) <<http://www.ato.gov.au/>>.

Australian Taxation Office *Your Case Matters 2012: Tax and Superannuation Litigation Trends* (Canberra, 2012d).

Axinn WG and Pearce LD *Mixed Method Data Collection Strategies* (Cambridge University Press, New York, 2006).

Barbour RS *Doing Focus Groups* (Sage Publications, London, 2007).

Barrett J and Kirk S “Running focus groups with elderly and disabled elderly participants” (2000) 31 *Applied Ergonomics* 621.

Barrios M, Villarroja A, Borrego A and Ollé C “Response rates and data quality in web and mail surveys administered to PhD holders” (2011) 29 *Social Science Computer Review* 208.

Barry v City West Water Ltd [2002] FCA 1214.

Barton C “Disputes settled without going to court” *The New Zealand Herald* (online ed, Auckland, 9 March 2012) <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10790835>.

Baylis C “Reviewing statutory models of mediation/conciliation in New Zealand: Three conclusions” (1999) 30 *Victoria University of Wellington Law Review* 270.

Becker D “The need for more regulation of mediation” (2012) 795 *LawTalk* 4.

Beech M “Mixing with the grown-ups” *NZLawyer* 181 (Auckland, 5 April 2012).

Berger KP *Private Dispute Resolution in International Business: Handbook* (Kluwer Law International, The Hague, 2006).

Bertrand JT, Brown JE and Ward VM “Techniques for analyzing focus group data” (1992) 16 *Evaluation Review* 198.

Blanchard G “The case for a simplified tax disputes process” (2005) 11 *New Zealand Journal of Taxation Law and Policy* 417.

Borkan J, Reis S, Hermoni D and Biderman A “Talking about the pain: A patient-centred study of low back pain in primary care” (1995) 40 *Social Science and Medicine* 977.

Boulle L, Goldblatt V and Green P *Mediation: Principles, Process and Practice* (2nd ed, LexisNexis NZ Ltd, Wellington, 2008).

Braithwaite V “Dancing with tax authorities: Motivational postures and non-compliant actions” in V Braithwaite (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing Ltd, Aldershot, 2003a) 15.

Braithwaite V (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing Ltd, Aldershot, 2003b).

Braithwaite V “Responsive regulation and taxation: Introduction” (2007) 29 Law & Policy 3.

Braithwaite V, Murphy K and Reinhart M “Taxation threat, motivational postures, and responsive regulation” (2007) 29 Law & Policy 137.

Brierley Investments Ltd v Bouzaid [1993] 3 NZLR 655, (1993) 15 NZTC 10,212 (CA).

Brown B and Butler A “Latest Tax Bill raises Bill of Rights questions” *NZLawyer* 152 (Auckland, 28 January 2011).

Brown C “Facilitative mediation: The classic approach retains its appeal” (2004) 4 Pepperdine Dispute Resolution Law Journal 279.

Bryman A and Bell E *Business Research Methods* (3rd ed, Oxford University Press, New York, 2011).

Bush RAB “What do we need a mediator for?: Mediation’s ‘value-added’ for negotiators” (1996) 12 Ohio State Journal on Dispute Resolution 1.

Campbell N and Hendriksen M “The conference phase of tax disputes – What you need to know” (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, 26-27 October 2012).

Carey MA “The group effect in focus groups: planning, implementing and interpreting focus group research” in J Morse (ed) *Critical Issues in Qualitative Research Methods* (Sage Publications, Thousand Oaks, 1994) 225.

Carey MA and Smith MW “Capturing the group effect in focus groups: A special concern analysis” (1994) 4 Qualitative Health Research 123.

Carter D and Palmer M (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002).

Chapman R “Mediation: Are we getting things right?” *NZLawyer Extra* 36 (online ed, Auckland, 14 October 2011) <<http://www.nzlawyermagazine.co.nz>>.

Charlton R *Dispute Resolution Guidebook* (Law Book Co, Sydney, 2000).

Chart J “What is ‘successful’ family mediation?” *NZLawyer Extra* 42 (online ed, Auckland, 3 February 2012) <<http://www.nzlawyermagazine.co.nz>>.

Commissioner of Inland Revenue v Abattis Properties Ltd [2002] NZCA 186, (2002) 20 NZTC 17,805.

Coleman C and Freeman L “Cultural foundations of taxpayer attitudes to voluntary compliance” (1997) 13 Australian Tax Forum 311.

Coleman J “Tax update” [2007] New Zealand Law Journal 407.

Coleman J and Trombitas E *Disputes with the IRD* (New Zealand Law Society, Wellington, 2009).

Colmar Brunton *NZICA Tax Management NZ IR Satisfaction Survey* (2012) New Zealand Institute of Chartered Accountants <<http://www.nzica.com>>.

Connaway LS, Johnson DW and Searing SE “Online catalogs from the users’ perspective: The use of focus group interviews” (1997) 58 College and Research Libraries 403.

Cooper DR and Schindler PS *Business Research Methods* (9th ed, McGraw Hill Irwin, Boston, 2006).

Couper MP “Web surveys: A review of issues and approaches” (2000) 64 Public Opinion Quarterly 464.

Creswell JW *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd ed, Sage Publications, Thousand Oaks, 2003).

De Vaus DA *Surveys in Social Research* (5th ed, Allen and Unwin, Sydney, 2002).

Dillman DA *Mail and Internet Surveys: The Tailored Design Method* (2nd ed, John Wiley and Sons, New York, 2000).

Dunlop N “Breaking new ground: Observations on the family mediation pilot” (2006) 5 New Zealand Family Law Journal 113.

Dunne J “The Tax Disputes Procedure: Legislative Change is Needed” *Taxation Today* 17 (Wellington, April 2009) 1.

Dunne J and Romanin E “The Australian tax objection procedures: Time for legislative reform” (2010) 45(1) *Taxation in Australia* 21.

Employment Relations Act 2000.

Ernst & Young *Tax Dispute Resolution: A New Chapter Emerges* (2010) <<http://www.ey.com>>.

Fan W and Yan Z “Factors affecting response rates of the web survey: A systematic review” (2010) 26 *Computers in Human Behavior* 132.

Financial Management and Accountability Act 1997 (Cth).

Fisher R “Is it rude to talk about who would win?: Part 1” *NZLawyer* 129 (Auckland, 8 February 2010a).

Fisher R “Is it rude to talk about who would win?: Part 2” *NZLawyer* 130 (Auckland, 19 February 2010b).

Fontaine L “Overview of IRS pre-Appeals alternative dispute resolution methods” (2012) 43 The Tax Adviser 229.

Fox G “The effectiveness of the Dispute Settlement Centre of Victoria in meeting client needs: Implications for practice” (paper presented to the National Mediation Conference 2012, Sydney, 10-14 September 2012).

Garwood M “Alternative dispute processes for commercial disputes – quality and style: A survey” (1999) 10 Australasian Dispute Resolution Journal 84.

Gilligan G and Richardson G “Perceptions of tax fairness and tax compliance in Australia and Hong Kong – A preliminary study” (2005) 12 Journal of Financial Crime 331.

Glaser BG “The constant comparative method of qualitative analysis” (1965) 12 Social Problems 436.

Glaser BG and Strauss AL *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine De Gruyter, New York, 1967).

Greenbaum TL “Outside moderators maximise focus group results” (1991) 47(9) Public Relations Journal 31.

Greenbaum TL *The Handbook for Focus Group Research* (2nd ed, Sage, London, 1998).

Griffiths S “Resolving New Zealand tax disputes: Finding the balance between judicial determination and administrative processes” (paper presented to the 24th Annual Australasian Tax Teachers’ Association Conference, Sydney, January 2012a).

Griffiths S “No discretion should be unconstrained: Considering the ‘care and management’ of taxes and the settlement of tax disputes in New Zealand and the UK” (2012b) British Tax Review 167.

Groffam Pty Ltd v Federal Commissioner of Taxation [1997] FCA 660, 36 ATR 493.

Hair JFF, Money AH, Samouel P and Page M *Research Methods for Business* (John Wiley and Sons Ltd, London, 2007).

Hart D “The case for mediation” *The New Zealand Herald* (online ed, Auckland, 9 March 2012) <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10790856>.

Hasseldine DJ, Kaplan SE and Fuller LR “Characteristics of New Zealand tax evaders: A note” (1994) 34 Accounting and Finance 79.

Hendriksen M “Disputes – The new improved process? – Part 1” (paper presented to the New Zealand Law Society Tax Conference, September 2011) 1.

Hennink MM *International Focus Group Research: A Handbook for Health and Social Sciences* (Cambridge University Press, Cambridge, 2007).

Hite PA and Roberts ML “An experimental investigation of taxpayer judgments on rate structure in the individual income tax system” (1991) 13(2) Journal of the American Taxation Association 115.

HM Revenue and Customs *Alternative Dispute Resolution Small and Medium Enterprises Trial: Frequently Asked Questions* (2011) <<http://www.hmrc.gov.uk/adr/faqs.pdf>>.

HM Revenue and Customs *Resolving Tax Disputes: Commentary on the Litigation and Settlement Strategy* (2012a) <<http://www.hmrc.gov.uk/practitioners/lss-guidance-final.pdf>>.

HM Revenue and Customs *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the use of Alternative Dispute Resolution in Large or Complex Cases* (2012b) <<http://www.hmrc.gov.uk/practitioners/adr-guidance-final.pdf>>.

HM Revenue and Customs “Alternative dispute resolution for small and medium enterprises and individuals” (media release, 4 February 2013a) <<http://www.hmrc.gov.uk/news/alternative-dispute.htm>>.

HM Revenue and Customs *Alternative Dispute Resolution for SME's and Individuals: Project Evaluation Summary* (2013b) <<http://www.hmrc.gov.uk/news/adr-public-eval-report.pdf>>.

Hodson A “Track A to E alphabet soup: John Russell’s still cooking!” (2011) 6(1) Journal of the Australasian Tax Teachers Association 68.

Hofmann E, Hoelzl E and Kirchler E “Preconditions of voluntary tax compliance: Knowledge and evaluation of taxation, norms, fairness, and motivation to cooperate” Journal of Psychology 216 (2008) 209.

Hoonakker P and Carayon P “Questionnaire survey nonresponse: A comparison of postal mail and internet surveys” (2009) 25 International Journal of Human-Computer Interaction 348.

Inland Revenue “Finalising agreements in tax investigations: Standard Practice Statement INV-350” (1998) 10(8) Tax Information Bulletin 4.

Inland Revenue *Settlement of disputed tax litigation* (ED0007, Wellington, October 1999a).

Inland Revenue *Finalising agreements in tax investigations* (ED0008, Wellington, October 1999b).

Inland Revenue *Resolving tax disputes: a legislative review – A government discussion document* (Wellington, 2003).

Inland Revenue *Interpretation of sections 6 and 6A of the Tax Administration Act 1994: Care and management of taxes – exposure draft for external consultation* (INS0072, Wellington, December 2005).

Inland Revenue *Care and management of the taxes covered by the Inland Revenue Acts – section 6A(2) and (3) of the Tax Administration Act 1994 – exposure draft for comment and discussion* (INS0072, Wellington, August 2008).

Inland Revenue “Changes to the disputes resolution process” (2010a) <<http://www.ird.govt.nz/technical-tax/general-articles/>>.

Inland Revenue “Disputing an assessment: The disputes resolution process” (2010b) <<http://www.ird.govt.nz/how-to/disputes/changes-disputes.html>>.

Inland Revenue *Disputes: a review – An officials’ issues paper* (Wellington, 2010c).

Inland Revenue “Disputes resolution process commenced by the Commissioner of Inland Revenue” (ED 0126, July 2010d) <<http://www.taxpolicy.ird.govt.nz/sites/default/files/2010-sps-ed0126-disputes.pdf>>.

Inland Revenue “Disputes resolution process commenced by a taxpayer” (ED 0127, July 2010e) <<http://www.taxpolicy.ird.govt.nz/sites/default/files/2010-sps-ed0127-disputes.pdf>>.

Inland Revenue “IS 10/07: Care and management of the taxes covered by the Inland Revenue Acts – section 6A(2) and (3) of the Tax Administration Act 1994” (2010f) 22(10) Tax Information Bulletin 17.

Inland Revenue “SPS 10/04: Disputes resolution process commenced by the Commissioner of Inland Revenue” (2010g) 22(11) Tax Information Bulletin 60.

Inland Revenue “SPS 10/05: Disputes resolution process commenced by a taxpayer” (2010h) 22(11) Tax Information Bulletin 94.

Inland Revenue *Taxation (Tax Administration and Remedial Matters) Bill: Officials’ Report to the Finance and Expenditure Select Committee on Submissions on the Bill* (April 2011a).

Inland Revenue “SPS 11/05: Disputes resolution process commenced by the Commissioner of Inland Revenue” (2011b) 23(9) Tax Information Bulletin 16.

Inland Revenue “SPS 11/06: Disputes resolution process commenced by a taxpayer” (2011c) 23(9) Tax Information Bulletin 50.

Inland Revenue *Disputing a notice of proposed adjustment: What to do if Inland Revenue disputes your assessment* (IR 777, Wellington, January 2012a).

Inland Revenue *Inland Revenue audits: Information for taxpayers* (IR 297, Wellington, February 2012b).

Inland Revenue *Disputing an assessment: What to do if you dispute an assessment* (IR 776, Wellington, April 2012c).

Inland Revenue *Helping you get it right: Inland Revenue's compliance focus 2012-13* (IR 504, Wellington, August 2012d).

Inland Revenue *Debt options* (IR 582, Wellington, April 2013a).

Inland Revenue "Change of name of the Adjudication Unit to Disputes Review Unit" (2013b) 25(6) Tax Information Bulletin 53.

Inspector-General of Taxation "Review of the ATO's Early and Alternative Dispute Resolution use" (media release, 26 July 2011a) <<http://www.igt.gov.au/content/media.asp>>.

Inspector-General of Taxation *Review into the ATO's use of Early and Alternative Dispute Resolution: Terms of Reference and Submission Guidelines* (Sydney, 2011b) <http://www.igt.gov.au/content/work_program.asp>.

Inspector-General of Taxation *Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution: A report to the Assistant Treasurer* (Sydney, 2012) <<http://www.igt.gov.au/content/reports.asp>>.

Internal Revenue Service *Revenue Procedure 2003-41: SB/SE – Appeals Fast Track Mediation Procedure* (2003) <<http://www.irs.gov/pub/irs-drop/rp-03-41.pdf>>.

Internal Revenue Service "Rev Proc 2009-44" *Internal Revenue Bulletin 2009-40* (5 October 2009) <<http://www.irs.gov/pub/irs-irbs/irb09-40.pdf>>.

Jackson BR and Milliron VC "Tax compliance research, findings, problems and prospects" (1986) 5 Journal of Accounting Literature 125.

Jamieson A "Brave new world mark III... are we there yet?" (November 2007) Chartered Accountants Journal 56.

Jamieson L and Williams LM "Focus group methodology: Explanatory notes for the novice nurse researcher" (2003) 14 Contemporary Nurse 271.

Jone M and Maples AJ "Mediation as an alternative option in Australia's tax disputes resolution procedures" (2012a) 27 Australian Tax Forum 529.

Jone M and Maples AJ "Mediation as an alternative option in New Zealand's tax disputes resolution procedures" (2012b) 18 New Zealand Journal of Taxation Law and Policy 412.

Jone M and Maples AJ "Mediation as an alternative option in the tax disputes resolution procedures: Part 1" *Taxation Today* 59 (Wellington, February 2013a) 14.

Jone M and Maples AJ "Mediation as an alternative option in the tax disputes resolution procedures: Part 2" *Taxation Today* 60 (Wellington, March 2013b) 12.

Kaplowitz MD, Hadlock TD and Levine R "A comparison of web and mail survey response rates" (2004) 68 Public Opinion Quarterly 94.

Kaplowitz MD, Lupi F, Couper MP and Thorp L “The effect of invitation design on web survey response rates” (2012) 30 Social Science Computer Review 339.

Keating M “Comment: The use of the Commissioner’s powers during litigation” (2007) 13 New Zealand Journal of Taxation Law and Policy 195.

Keating M “Comment: New Zealand’s tax dispute procedure: Time for a change” (2008) 14 New Zealand Journal of Taxation Law and Policy 425.

Keating M *Tax Disputes in New Zealand: A Practical Guide* (CCH New Zealand Ltd, Auckland, 2012).

Keating M and Lennard M “Developments in tax disputes – Another step backwards?” (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, 11-12 November 2011).

Kinsey KA “Deterrence and alienation effects of IRS enforcement: An analysis of survey data” in J Slemrod (ed) *Why People Pay Taxes: Tax Compliance and Enforcement* (University of Michigan Press, Ann Arbor, 1992) 259.

Kirchler E *The Economic Psychology of Tax Behaviour* (Cambridge University Press, Cambridge, 2007).

Kirchler E, Hoelzl E and Wahl I “Enforced versus voluntary tax compliance: The ‘slippery slope’ framework” (2008) 29 Journal of Economic Psychology 210.

Kitzinger J “Introducing focus groups” (1995) 311(7000) British Medical Journal 299.

KPMG “KPMG’s Submission on the Taxation (Tax Administration and Remedial Matters) Bill” (2011).

Krueger RA and Casey MA “Designing and Conducting Focus Group Studies” (World Bank Social Development Paper No 36, World Bank Social Development Department, June 2001).

Krueger RA and Casey MA *Focus Groups: A Practical Guide for Applied Research* (4th ed, Sage Publications, Thousand Oaks, 2009).

Kwak N and Radler B “A comparison between mail and web surveys: Response pattern, respondent profile and data quality” (2002) 18 Journal of Official Statistics 257.

Lamb M “Interdisciplinary taxation research – An introduction” in M Lamb, A Lymer, J Freedman and S James (eds) *Taxation: An Interdisciplinary Approach to Research* (Oxford University Press, Oxford, 2005) 3.

Lapadat JC and Lindsay AC “Transcription in research and practice: From standardization of technique to interpretive positionings” (1999) 5 Qualitative Inquiry 64.

Law Council of Australia “Development of IGT Workplan: 2011” (2011) <<http://www.lawcouncil.asn.au>>.

Law Society of New South Wales “Review into the ATO’s use of Early and Alternative Disputes Resolution” (2011) <<http://www.lawsociety.com.au>>.

Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* (2007) <<http://www.justice.govt.nz/lac/>>.

Lennard M “Peace in Our Time: Part 1” *Taxation Today* 4 (Wellington, February 2008a) 29.

Lennard M “Peace in Our Time: Part 2” *Taxation Today* 5 (Wellington, March 2008b) 16.

Liamputtong P *Qualitative Research Methods* (3rd ed, Oxford University Press, Melbourne, 2009).

Liamputtong P *Focus Group Methodology: Principles and Practice* (Sage Publications, Thousand Oaks, 2011).

Lignier P “Measuring the managerial benefits of tax compliance: A fresh approach” (2009) 24 Australian Tax Forum 117.

Lignier P and Evans C “The rise and rise of tax compliance costs for the small business sector in Australia” (2012) 27 Australian Tax Forum 615.

Litoselliti L *Using Focus groups in Research* (Continuum, London, 2003).

Loo EC, McKerchar M and Hansford A “Understanding the compliance behaviour of Malaysian individual taxpayers using a mixed method approach” (2009) 4(1) Journal of the Australasian Tax Teachers Association 181.

Love LP “The top ten reasons why mediators should not evaluate” (1997) 24 Florida State University Law Review 937.

Maclaren K and Keating M “The settlement of tax disputes: the Commissioner is able but not willing” (2009) 15 New Zealand Journal of Taxation Law and Policy 323.

Magner N, Sobery JS and Welker RB “Tax decision making in municipal governments: Citizens’ reactions to outcomes and procedures” (1998) 9 Journal of Public Budgeting, Accounting and Financial Management 552.

Martin D “Inland Revenue’s accountability to taxpayers” (2008) 14 New Zealand Journal of Taxation Law and Policy 9.

McDonough KJ “Resolving federal tax disputes through ADR” (1993) 48(2) Arbitration Journal 38.

McGhee TM, White RA and Cohn E “The effect of corporate tax allocations on horizontal equity analysis for individual income taxpayers” (1996) 8 Advances in Taxation 101.

McKerchar M “The impact of income tax complexity on practitioners in Australia” (2005) 20 Australian Tax Forum 529.

McKerchar M “Philosophical paradigms, inquiry strategies and knowledge claims: Applying the principles of research design and conduct to taxation” (2008) 6 eJournal of Tax Research 5.

McKerchar M *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, Sydney, 2010).

McKerchar M and Hansford A “Achieving innovation and global competitiveness through research and development tax incentives: Lessons for Australia from the UK” (2012) 27 Australian Tax Forum 3.

McLafferty I “Focus group interviews as a data collecting method” (2004) 48 Journal of Advanced Nursing 187.

Mediator Standards Board *National Mediator Accreditation Standards: Approval Standards* (2012) <<http://www.msb.org.au>>.

Menkel-Meadow C “The many ways of mediation: The transformation of traditions, ideologies, paradigms and practices” (1995) 11 Negotiation Journal 217.

Meyercord L “Avoiding state bankruptcy: Mediation as an alternative to resolving state tax disputes” (2010) 29 The Review of Litigation 925.

Miller Parr C “Why post appeal mediation isn't working and how to fix it” (2009) 124(14 September) Tax Notes 1113.

Ministry of Economic Development “Small and medium sized enterprises” (2013) <<http://www.med.govt.nz/>>.

Ministry of Justice *Alternative Dispute Resolution: General Civil Cases* (prepared for the Ministry of Justice by K Saville-Smith and R Fraser, Centre for Research Evaluation and Social Assessment, Wellington, 2004) <<http://www.justice.govt.nz/publications/global-publications>>.

Mookhey S “Tax disputes system design” (2013) 11 eJournal of Tax Research 79.

Morgan DL *Focus Groups as Qualitative Research* (Sage Publications, Newbury Park, 1988).

Morgan DL “Focus groups” (1996) 22 Annual Review of Sociology 129.

Morgan DL *Focus Groups as Qualitative Research* (Sage Publications, Thousand Oaks, 1997).

Morgan DL and Krueger RA “When to use focus groups and why” in DL Morgan (ed) *Successful Focus Groups: Advancing the State of the Art* (Sage Publications, Newbury Park, 1993) 3.

Morris T and Lonsdale M “Translating the Compliance Model into practical reality” (paper presented to the 2004 Internal Revenue Service Research Conference, Washington DC, 2-3 June 2004).

Muehlbacher S, Kirchler E and Schwarzenberger H “Voluntary versus enforced tax compliance: Empirical evidence for the ‘slippery slope’ framework” (2011) 32 *European Journal of Law and Economics* 89.

Mullen PE and Lester G “Vexatious litigants and unusually persistent complainants and petitioners: From querulous paranoia to querulous behaviour” (2006) 24 *Behavioral Sciences and the Law* 333.

Murphy K “Regulating more effectively: The relationship between procedural justice, legitimacy, and tax non-compliance” (2005) 32 *Journal of Law and Society* 562.

National Alternative Dispute Resolution Advisory Council *Report to the Commonwealth Attorney-General: A Framework for ADR Standards* (Barton, 2001) <<http://www.nadrac.gov.au/publications>>.

National Alternative Dispute Resolution Advisory Council *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (Barton, 2003) <<http://www.nadrac.gov.au/publications>>.

National Alternative Dispute Resolution Advisory Council *Alternative Dispute Resolution in the Civil Justice System: Issues Paper* (Barton, 2009a) <<http://www.nadrac.gov.au/publications>>.

National Alternative Disputes Resolution Advisory Council *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General* (Barton, 2009b) <<http://www.nadrac.gov.au/publications>>.

Lord Neuberger of Abbotsbury Master of the Rolls “Has Mediation had its Day?” (Gordon Slynn Memorial Lecture 2010, 10 November 2010).

Neuman WL *Social Research Methods: Qualitative and Quantitative Approaches* (4th ed, Allyn and Bacon, Boston, 2000).

New Zealand Institute of Chartered Accountants “2012 Tax Conference” (2012) <<http://www.nzica.com>>.

New Zealand Law Society *Tax Conference 2012* (New Zealand Law Society, Wellington, 2012).

Ng L and Cuniffe C “Inland Revenue service – are you satisfied?” (February 2013) *Chartered Accountants Journal* 78.

O’Brien G “Letter to the editor: Mediation and the civil justice system” *NZLawyer* 167 (Auckland, 26 August 2011).

Onwuegbuzie AJ, Dickinson WB, Leech NL and Zoran AG “A qualitative framework for collecting and analyzing data in focus group research” (2009) 8(3) International Journal of Qualitative Methods 1.

Organisational Review Committee *Organisational Review of the Inland Revenue Department* (New Zealand Government, Wellington, 1994).

Palmer M and Roberts S *Dispute Processes: ADR and Primary Forms of Decision Making* (Butterworths, London, 1998).

Parsly D “The Internal Revenue Service and alternative dispute resolution: Moving from infancy to legitimacy” (2007) 8 Cardozo Journal of Conflict Resolution 677.

Patton MQ *Qualitative Research and Evaluation methods* (3rd ed, Sage Publications, Thousand Oaks, 2002).

Peck J and Maples AJ “Comment: The tax disputes resolution process in New Zealand: What about the little fellas?” (2010) 16 New Zealand Journal of Taxation Law and Policy 348.

Penny and Hooper v Commissioner of Inland Revenue [2011] NZSC 95, (2011) 25 NZTC 20-073.

Porcano TM and Price CE “Some evidence on the association between judgment criteria and fairness perceptions” (1992) 4 Advances in Taxation 183.

Porter SR and Whitcomb ME “The impact of contact type on web survey response rates” (2003) 67 Public Opinion Quarterly 579.

Porter SR and Whitcomb ME “Email subject lines and their effect on web survey viewing and response” (2005) 23 Social Science Computer Review 380.

Powell C “Alternative dispute resolution” [2013] New Zealand Law Journal 21.

Powell RA and Single HM “Focus groups” (1996) 8 International Journal for Quality in Health Care 499.

Precision Pools Ltd v Federal Commissioner of Taxation [1992] FCA 445, (1992) 37 FCR 554, 24 ATR 43.

PricewaterhouseCoopers “Submission on the Taxation (Tax Administration and Remedial Matters) Bill” (2011).

Quine S “Focus groups: The role of the scribe and procedures for transcription” (1998) 8 Health Promotion Journal of Australia 214.

Rabiee F “Focus-group interview and data analysis” (2004) 63 Proceedings of the Nutrition Society 655.

Redmond R and Curtis E “Focus groups: Principals and process” (2009) 16(3) Nurse Researcher 57.

Richardson G “The impact of tax fairness dimensions on tax compliance behavior in an Asian jurisdiction: The case of Hong Kong” (2006) 32 International Tax Journal 29.

Richardson M and Sawyer AJ “A taxonomy of the tax compliance literature: Further findings, problems and prospects” (2001) 16 Australian Taxation Forum 137.

Riskin LL “Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed” (1996) 1 Harvard Negotiation Law Review 7.

Rothengatter MR “Social networks and tax (non-)compliance in a multicultural nation: Emerging themes from a focus-group study among ethnic minorities in Australia” (2005) 11 International Journal of Entrepreneurial Behaviour and Research 280.

Russ N and Davies S “A better way of resolving tax disputes” (May 2013) Australasian Legal Business Magazine 9.

Saad N “Fairness perceptions and compliance behaviour: The case of salaried taxpayers in Malaysia after implementation of the self-assessment system” (2010) 8 eJournal of Tax Research 32.

Saad N “Fairness perceptions and compliance behaviour: The New Zealand evidence” (2011) 17 New Zealand Journal of Taxation Law and Policy 33.

Schonlau M, Fricker RD and Elliott MN *Conducting Research Surveys via E-mail and the Web* (Rand, Santa Monica, 2002).

Sheppard Industries Ltd v Specialized Bicycle Components Inc [2011] NZCA 346, [2011] 3 NZLR 620.

Shih TH and Fan X “Comparing response rates from web and mail surveys: A meta-analysis” (2008) 20 Field Methods 249.

Shoaf EC “Using a professional moderator in library focus group research” (2003) 64 College and Research Libraries 124.

Sills C and Song SJ “Innovations in survey research: An application of web-based surveys” (2002) 20 Social Science Computer Review 22.

Smithson J “Focus groups” in P Alasuutari, L Bickman and J Brannen (eds) *The Sage Handbook of Social Research Methods* (Sage Publications, Thousand Oaks, 2008) 356.

Song Y and Yarbrough TE “Tax ethics and taxpayer attitudes: A survey” (1978) 38 Public Administration Review 442.

Sourdin T and Thorpe L “Consumer perceptions of dispute resolution processes” (2008) 15 Competition and Consumer Law Journal 337.

Spencer D and Brogan M *Mediation Law and Practice* (Cambridge University Press, New York, 2006).

Stewart DW, Shamdasani PN and Rook DW *Focus Groups: Theory and Practice* (2nd ed, Sage Publications, Thousand Oaks, 2007).

Stulberg JP “Facilitative versus evaluative mediator orientations: Piercing the ‘grid’ lock” (1997) 24 Florida State University Law Review 985.

Sue VM and Ritter LA *Conducting Online Surveys* (2nd ed, Sage Publications, Thousand Oaks, 2012).

Synodinos N “The ‘art’ of questionnaire construction: Some important considerations for manufacturing studies” (2003) 14 Integrated Manufacturing Systems 221.

Tan LM “Taxpayers’ perceptions of fairness of the tax system: A preliminary study” (1998) 4 New Zealand Journal of Taxation Law and Policy 59.

Tax Administration Act 1994.

Taxation Reform (Binding Rulings and Other Matters) Bill 1994 (67-2).

Taxation (Tax Administration and Remedial Matters) Act 2011.

Taxation (Tax Administration and Remedial Matters) Bill 2010 (257-2).

Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994* (Wellington, 2008).

Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *Disputes: A Review, July 2010* (Wellington, 2010).

Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *Taxation (Tax Administration and Remedial Matters) Bill* (Wellington, 2011).

Taylor AF, Kuo FF and Sullivan SF “Coping with ADD: The surprising connection to green play settings” (2001) 33 Environment and Behavior 54.

Tran-Nam B and Karlinsky S “Small Business Tax Complexity in Australia” (paper presented to the 8th International Tax Administration Conference, Sydney, 27-28 March 2008).

Tyler TR *Why People Obey the Law* (Yale University, New Haven, 1990).

Tyler TR “The psychology of legitimacy: A relational perspective on voluntary deference to authorities” (1997) 1 *Personality and Social Psychology Review* 323.

Tyler TR and Huo YJ *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation, New York, 2002).

Tyler TR and Lind EA “A relational model of authority in groups” in M Zanna (ed) *Advances in Experimental Social Psychology* (Academic Press, New York, 1992) 115.

Van Dijke M and Verboon P “Trust in authorities as a boundary condition to procedural fairness effects on tax compliance” (2010) 31 *Journal of Economic Psychology* 80.

Vinelight Nominees Ltd v Commissioner of Inland Revenue (2005) 22 NZTC 19,298 (HC).

Wahl I, Kastlunger B and Kirchler E “Trust in authorities and power to enforce tax compliance: An empirical analysis of the ‘slippery slope framework’” (2010) 32 *Law & Policy* 383.

Wei AS “Can mediation be the answer to taxpayers’ woes?: An examination of the Internal Revenue Service’s mediation program” (2000) 15 *Ohio State Journal on Dispute Resolution* 549.

Wenzel M “Tax compliance and the psychology of justice: Mapping the field” in V Braithwaite (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing Ltd, Aldershot, 2003) 41.

Wenzel M “A letter from the Tax Office: Compliance effects of informational and interpersonal justice” (2006) 19 *Social Justice Research* 345.

Whitiskie K “Settlement of tax disputes in litigation” (paper presented to the New Zealand Law Society Tax Conference, September 2011) 49.

Winkelmann H “ADR in the Civil Justice System” (speech to the Arbitrators’ and Mediators’ Institute of New Zealand Annual Conference, Auckland, 6 August 2011).

Woellner R, Coleman C, McKerchar M, Walpole M and Zetler J “Can simplified legal drafting reduce the psychological costs of tax compliance?: An Australian perspective” (2007) *British Tax Review* 717.

Wooten III LE “IRS alternative dispute resolution programs” (2012) 31(3) *Tax Assessments* 7.

Worsham RG “The effect of tax authority behaviour on taxpayer compliance: A procedural justice approach” (1996) 18(2) *Journal of the American Taxation Association* 19.

Yamagata-Lynch LC *Activity Systems Analysis Methods: Understanding Complex Learning Environments* (Springer, New York, 2010).

Yin RK *Case Study Research: Design and Methods* (3rd ed, Sage Publications, Thousand Oaks, 2003).

Yitzhaki S “A note on income tax evasion: A theoretical analysis” (1974) 3 *Journal of Public Economics* 201.

Young NJ and Von Seggern M “General information seeking in changing times: A focus group study” (2001) 41 *Reference and User Services Quarterly* 159.

Young W “Tax disputes in New Zealand” (2009) 4(1) *Journal of the Australasian Tax Teachers Association* 1.

Young W “Foreword” in AJ Maples and AJ Sawyer (eds) *Taxation Issues: Existing and Emerging* (Centre for Commercial and Corporate Law, Christchurch, 2011) v.

Appendices

Appendix 1: University of Canterbury Human Ethics Committee Approval Letter



HUMAN ETHICS COMMITTEE

Secretary, Lynda Griffioen
Email: human-ethics@canterbury.ac.nz

Ref: HEC 2012/88/LR

15 October 2012

Melinda Jone
Department of Accounting & Information Systems
UNIVERSITY OF CANTERBURY


Dear Melinda

Thank you for forwarding your Human Ethics Committee Low Risk application for your research proposal "Refining a proposed tax mediation regime for New Zealand's tax disputes resolution procedures: a mixed methods study".

I am pleased to advise that this application has been reviewed and I confirm support of the Department's approval for this project.

With best wishes for your project.

Yours sincerely

pp 

Lindsey MacDonald
Chair, Human Ethics Committee

Appendix 2: Sample of the Survey Questionnaire¹



College of Business and Economics

Survey on the proposed use of mediation in New Zealand's tax disputes resolution procedures

Please return your completed questionnaire to:
melinda.jone@pg.canterbury.ac.nz
with "Tax disputes mediation survey" in the subject-line.

¹ This version of the survey questionnaire was distributed to the Canterbury mediation experts. The version distributed to the tax experts was identical in all respects except that it excluded the five-page information document labelled "The New Zealand tax disputes resolution procedures". Also, note that only the survey questionnaires distributed to the Canterbury participants had the focus group consent form attached (see Appendix 7).

Melinda Jone
Department of Accounting and Information Systems
Tel: [REDACTED]
Email: melinda.jone@pg.canterbury.ac.nz

Survey on the proposed use of mediation in New Zealand's tax disputes resolution procedures

Dear Participant,

1. Attached to this questionnaire are two documents. The first document is labelled **“The New Zealand tax disputes resolution procedures.”** This document provides as background information a brief overview of the current New Zealand tax disputes resolution procedures. The second document is labelled **“Researcher's proposed New Zealand tax mediation regime.”** This document outlines the researcher's proposed tax mediation regime for New Zealand. **Please read both of these documents before completing the questionnaire.**
2. The completion of the questionnaire (including reading the attached documents) should take you no longer than 15-20 minutes. The questionnaire consists of statements that require you to respond accordingly, although there are no right or wrong answers.
3. In addition to completing the questionnaire, I would like to invite you to take part in a focus group session later in the year. You may provide your consent to participate on the attached consent form.
4. Please return your responses and consent form to take part in the focus group session (if agreed) by email to: melinda.jone@pg.canterbury.ac.nz by **Monday 12th November 2012.**

Thank you. I look forward to receiving your responses.

Yours sincerely

Melinda Jone
Postgraduate student
Department of Accounting
and Information Systems
University of Canterbury

Andrew J Maples
Associate Professor of Taxation Law
Department of Accounting and
Information Systems
University of Canterbury

Alistair G Hodson
Assistant Lecturer
Department of Accounting
and Information Systems
University of Canterbury

The New Zealand tax disputes resolution procedures

In the context of the New Zealand dispute resolution procedures, a ‘tax dispute’ is any instance where the Inland Revenue Department (Inland Revenue) or a taxpayer takes issue with the other over a matter involving the application of a tax law and the consequent determination of a tax liability or an aspect of the administration of the law.

The New Zealand tax disputes resolution procedures are prescribed in Part IVA of the Tax Administration Act 1994 (TAA 1994). The formal disputes resolution process may be commenced by the Commissioner of Inland Revenue (the Commissioner) when a taxpayer and Inland Revenue have not reached agreement on a tax position taken in a taxpayer’s tax return (known as a self-assessment). This often follows an audit of the taxpayer’s tax affairs by Inland Revenue. If no agreement has been reached on some or all of the issues identified in the audit, the Commissioner will begin the disputes process by issuing a notice of proposed adjustment (NOPA) (see Figure 1). Alternatively, a dispute may be commenced by a taxpayer when the taxpayer disputes either: (a) their own assessment (e.g. wishes to amend a tax return that they have filed with Inland Revenue); or (b) an assessment made by the Commissioner, by issuing a NOPA (see Figure 2).

The prescribed process involves the following pre-assessment phase, comprising the exchange of a number of documents by the taxpayer and Inland Revenue within legislatively prescribed timeframes:

- *NOPA*: The NOPA is the first formal step in the disputes process and is issued by either the Commissioner or the taxpayer to the other party advising that an adjustment

is sought to the taxpayer's self-assessment or the Commissioner's assessment of the taxpayer's tax affairs.

- *Notice of Response (NOR)*: A NOR is issued by the recipient of a NOPA if they disagree with the NOPA. The NOR responds to the matters raised in the NOPA and outlines the responding party's arguments in support of their position.
- *Disclosure Notice*: The Disclosure Notice is issued by the Commissioner requiring the taxpayer and the Commissioner to issue a statement of position (SOP).
- *SOPs*: The SOP is issued by both parties, providing an outline of the issues, facts, evidence and relevant law with sufficient detail to support the position taken by the party.

The disputes resolution process also includes two administrative (non-legislated) procedures – the conference and adjudication phases. If a dispute has not been resolved following the exchange of the NOPA and NOR, (one or more) conference meetings may be held between the parties to clarify and if possible, resolve the issues in dispute. Taxpayers are also offered the opportunity to have any conference meeting(s) attended by a facilitator who is a senior Inland Revenue officer with no involvement in the dispute. The conference facilitator is not responsible for making any decision in relation to the dispute, except for determining when the conference phase has come to an end.

In addition, in certain circumstances, taxpayers can request to “opt-out” of the disputes process (and proceed to court) after the conference phase provided, inter alia, that the taxpayer has “participated meaningfully” in discussions during the conference phase.

Given the taxpayer has not opted-out of the disputes process, disputes that remain unresolved following the issuing of SOPs are referred to Inland Revenue's Adjudication Unit in Wellington. The Adjudication Unit's function is to consider the dispute impartially and independently of Inland Revenue's audit function. If the adjudicator finds in favour of the taxpayer, the dispute will conclude. If the adjudicator agrees with all or any of the adjustments proposed by the Commissioner, an assessment consistent with these findings will be issued. At this point the disputes resolution process has been completed. If the taxpayer wishes to challenge the assessment they may do so by commencing court proceedings within the two-month response period. The dispute can be heard in the Taxation Review Authority or the High Court.

Figure 1: New Zealand tax disputes process commenced by the Commissioner of Inland Revenue

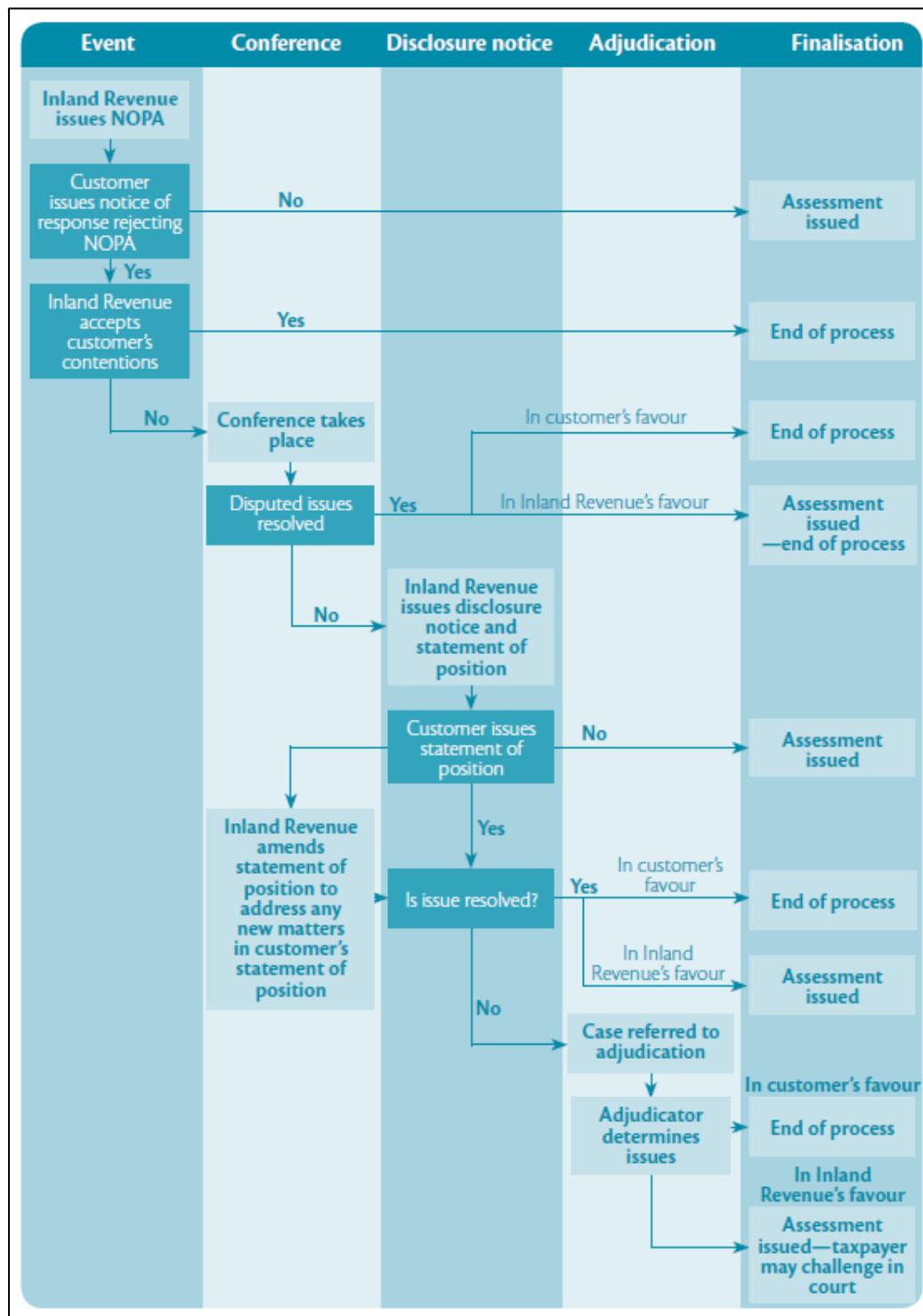
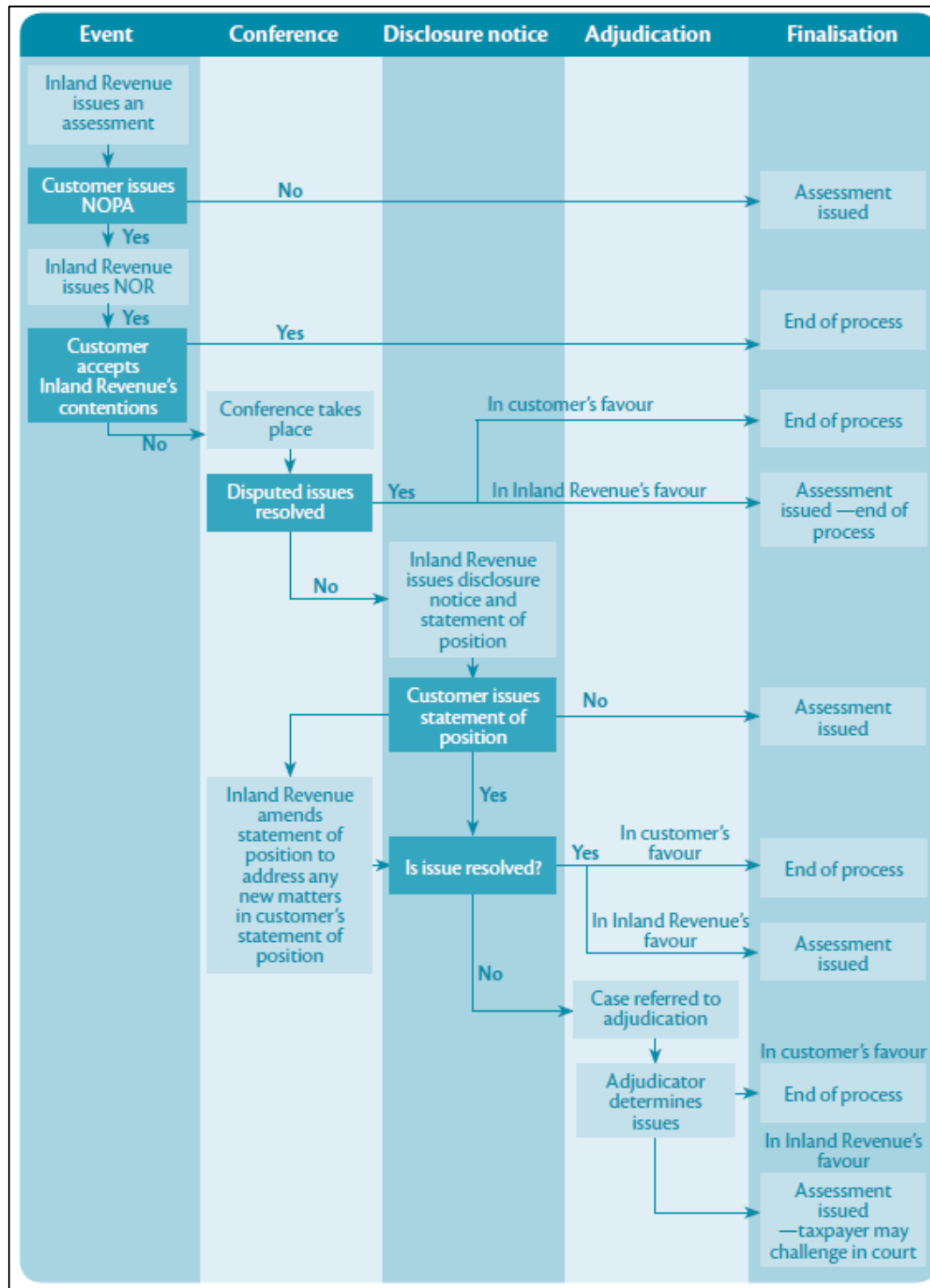


Figure 2: New Zealand tax disputes process commenced by a taxpayer



Researcher's proposed New Zealand tax mediation regime

This document outlines the researcher's proposed mandatory tax mediation regime for New Zealand. It is proposed that mediation would become a legislated phase of the New Zealand tax disputes resolution procedures under Part IVA (Disputes Procedures) of the Tax Administration Act 1994 (TAA 1994) and that the researcher's suggested timeframes for the modified New Zealand tax disputes resolution procedures, incorporating the proposed mediation phase, would also be legislated for.

The following table outlines the suggested features of the researcher's proposed New Zealand tax mediation regime.

Table 1: Suggested features for a New Zealand tax mediation regime

Tax Mediation Regime Features	Suggestions for New Zealand
Legislation	Part IVA TAA 1994
Mediator type	Member of a panel of independent specialist tax mediators appointed by (an enhanced) TRA and employed by the Courts of New Zealand, or in instances where the parties request a private mediator, a person engaged for the purpose and considered to be suitable by the TRA.
Confidentiality	Information provided at mediation is confidential and is not able to be used in a later hearing unless parties agree. The confidentiality of information exchanged during the mediation process would be legislatively provided for under Part IVA of the TAA 1994.
Mandatory	Mediation is mandatory (subject to the exclusions below).
Stage of the disputes resolution process that the mediation phase occurs	After the issue (and subsequent rejection by the other party) of a Notice of Response (NOR) by either the taxpayer or the Commissioner.
Types of disputes mediation is available for (and types of disputes excluded)	The types of disputes for which mediation is available is not restrictive. However, mediation may not be appropriate where: it would be in the public interest to have judicial clarification of the issues in dispute; resolution can only be achieved by departure from an established 'Inland Revenue view' on a technical issue; the dispute is of a kind where the state of the relationship between the parties is such that any proposed mediation is unlikely to be successful; the dispute concerns a

Tax Mediation Regime Features	Suggestions for New Zealand
	frivolous issue; or the dispute involves certain procedural issues.
Cost to taxpayer disputant(s)	None. However, if a private mediator is engaged by the parties, then the costs involved in employing the mediator are to be agreed on between the parties.
Number of times that the mediation phase can occur in the tax disputes resolution process	Once. However, more than one mediation session may be held during the mediation phase if this is deemed beneficial by both of the parties and by the mediator.
Role of mediator (that is, facilitative and/or evaluative)	<p>Facilitative. The mediator will assist the parties to identify the disputed issues, develop options and consider alternatives in an endeavour that the parties reach their own agreement on the issue(s) in dispute. The mediator will have no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution between the parties is attempted.</p> <p>Evaluative. If an agreement cannot be reached by the parties through mediation, the parties can together choose to allow the mediator to make a recommendation on how to resolve the dispute.²</p>
Binding agreement	<p>Any agreement reached by the parties themselves through mediation is final and binding on them once the agreement is signed by both of the parties and the mediator.</p> <p>Where the parties together agree to give the mediator the authority to make a recommendation on how to resolve the dispute; the mediator's recommendation will then be full, final and enforceable unless either of the parties notifies the mediator within seven days of the mediator's recommendation; that they reject the recommendation made.</p>

The researcher's modified New Zealand tax disputes resolution procedures incorporating the proposed mandatory mediation phase are outlined in diagrammatic form in Figures 3 and 4. The path of tax disputes which are not deemed suitable for mediation is not considered in this study.

² Note that, this is based on an equivalent procedure followed by the Department of Labour's mediation services in the New Zealand Employment Court.

Figure 3: Proposed New Zealand tax disputes process commenced by the Commissioner of Inland Revenue

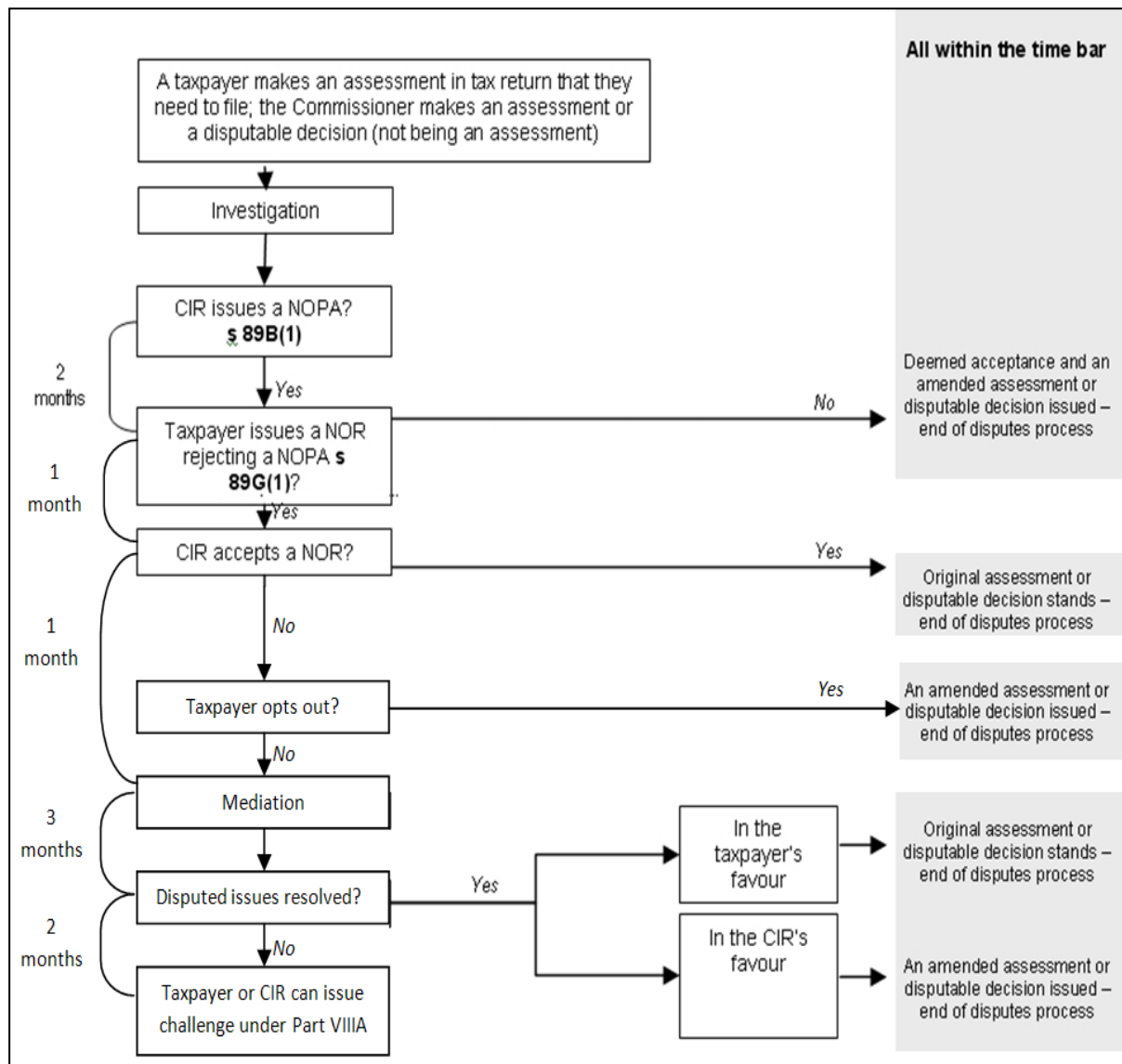
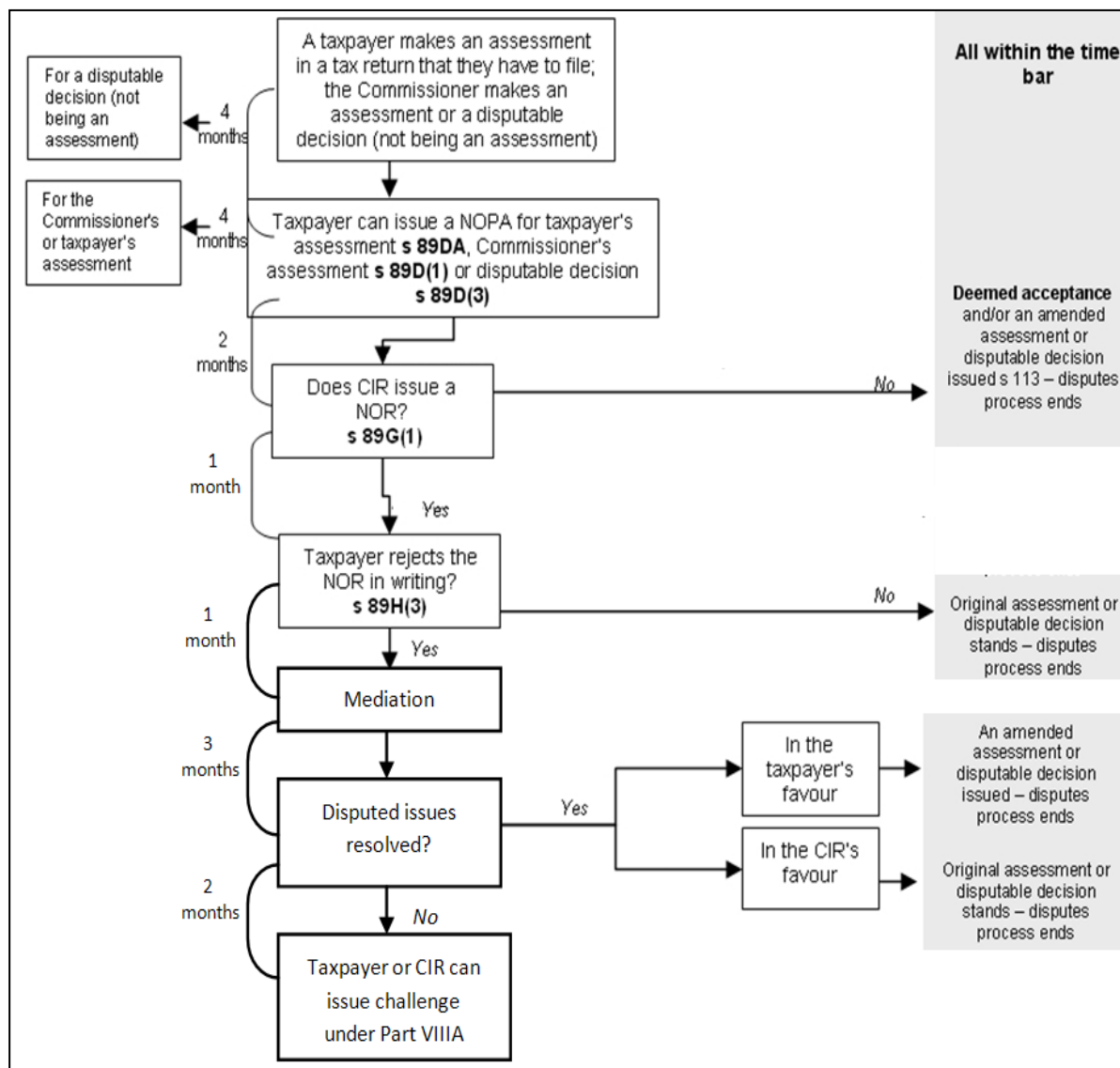


Figure 4: Proposed New Zealand tax disputes process commenced by a taxpayer



- In disputes commenced by the Commissioner (see Figure 3), the issue of a NOR by the taxpayer (followed by the rejection of the taxpayer's NOR by the Commissioner within one month) automatically initiates the mandatory mediation phase. However, the taxpayer has the opportunity to opt out³ of mediation and end the disputes process at this point, thus accepting Inland Revenue's position, by notifying Inland Revenue of their decision to opt out within two weeks of the Commissioner's rejection of the taxpayer's NOR.
- In disputes commenced by a taxpayer (see Figure 4), the issue of a rejection by the taxpayer within one month of the Commissioner's NOR automatically initiates the mandatory mediation process. Neither the taxpayer nor the Commissioner has the ability to opt out of mediation (and end the disputes resolution process) where the dispute is commenced by the taxpayer.⁴
- In disputes commenced by the Commissioner as well as disputes commenced by a taxpayer, Inland Revenue must file the Notice of Proposed Adjustment (NOPA), NOR and other relevant documentation with the TRA within one month of the issue of a rejection of a NOR by the Commissioner (or the taxpayer).

³ Note that the opt out feature of the researcher's proposed New Zealand tax mediation regime refers to when the taxpayer chooses to accept the Commissioner's position and therefore decides not to proceed further with the dispute. On choosing to opt out (of mediation) the taxpayer ends the disputes resolution process at this point and the taxpayer cannot file court proceedings. This is distinct from the opt out feature as used in the context of the tax current disputes resolution procedures where, after the conference phase, the taxpayer can elect to opt out of completing the remainder of the disputes procedures and proceed to court if the taxpayer has "participated meaningfully" in discussions during the conference phase and certain other criteria are met.

⁴ This is on the basis that the Commissioner would have had the opportunity to 'opt out' of the disputes process earlier through choosing not to issue a NOR. Similarly, the taxpayer would have had the opportunity to 'opt out' through accepting the Commissioner's NOR.

- In the (anticipated infrequent) instance where the taxpayer wishes to engage a private mediator, they must notify Inland Revenue. Inland Revenue and the taxpayer will then jointly select a private mediator and determine how the costs are to be allocated between the parties. This information must also be filed with the TRA by Inland Revenue along with the NOPA, NOR and other relevant documentation.
- The receipt of the above information by the TRA officially marks the start of the mediation phase. Upon receipt of the information the TRA will assess whether the dispute is appropriate for mediation. It is proposed that limited judicial review by the High Court of a TRA decision to (or not to) mediate a certain dispute will be available to the parties. The TRA will contact the taxpayer and Inland Revenue within one month of the receipt of the information and provided that the dispute is appropriate for mediation, will provide both parties with details of the date, time and place of mediation. If a private mediator has been requested by the parties, the TRA will notify the taxpayer and Inland Revenue whether the mediator selected by the parties has been approved
- If a private mediator has not been requested by the parties, a default mediator will be allocated from the TRA's panel of specialist tax mediators. The TRA's panel of specialist tax mediators would be independent of Inland Revenue, and approved and appointed by the TRA. The panel would consist of specialist tax professionals (for example, tax accountants and lawyers) with suitable industry experience and knowledge of the tax law. Members of the panel must also be suitably qualified and experienced in mediation.

- Taxpayers may represent themselves or choose to have representation. At least one participant with decision making authority for each party must be present at the mediation session(s). Any agreement reached by the parties through mediation is final and binding on the parties once the agreement is signed by both of the parties and the mediator. The signed agreement is then lodged with the TRA.
- The length of the mediation phase (starting from the receipt of the NOPA, NOR and other relevant information by the TRA from Inland Revenue) is expected to be completed within three months, subject to the facts and complexity of the dispute. The mediation phase will be made available to parties only once per tax dispute. However, the mediation phase may involve more than one mediation session. Litigation for unresolved matters may only be commenced upon completion of the mandatory mediation phase. The taxpayer (or the Commissioner) must file proceedings with the TRA or High Court within two months from the end of the mediation phase.

Survey Questions

The following statements refer to the attached document labelled **“Researcher’s proposed New Zealand tax mediation regime.”** Please indicate how much you agree or disagree with each statement by placing an **“X”** in the corresponding boxes below for questions 1-9.

Responses to this survey will be treated as strictly confidential.

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
1. The mediator should be selected from a specialist panel of tax mediators independent of Inland Revenue.					
2. Information exchanged during the mediation process should be confidential (that is, not able to be used in a later hearing).					
3. Mediation should be a mandatory phase of the tax disputes resolution process.					
4. The mediation phase should occur after the Notice of Response (NOR) stage of the tax disputes resolution process.					
5. Certain types of tax disputes should be able to be excluded from the mediation process (as outlined in Table 1).					
6. The mediation services provided should be at no cost to the taxpayer unless a private mediator is engaged by the parties.					
7. The mediation phase should occur only once in the tax disputes resolution process.					
8. At the request of the parties to the dispute, the mediator should be able to make a recommendation on the resolution of the dispute.					

Please answer Question 9 **only** if you answered “Strongly agree”, “Agree”, or “Neither agree nor disagree” to Question 8:

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
9. The parties should be able to reject the mediator’s recommendation.					

Do you have any general comments? (Please use additional space if required).

☐ Please indicate with an “X” if you would like to receive a copy of a summary of the research results when they become available.

Thank you for your participation.
235

Appendix 3: Samples of the Covering Letters to the Survey Questionnaires

Appendix 3.1: Covering Letter to the Canterbury Participants

College of Business and Economics

Melinda Jone
Department of Accounting and Information Systems
Tel: [REDACTED]
Email: melinda.jone@pg.canterbury.ac.nz



16 October 2012

Survey on the proposed use of mediation in New Zealand's tax disputes resolution procedures

Dear Participant,

You are invited to participate in a research project on the proposed use of mediation in New Zealand's tax disputes resolution procedures. The project is being carried out as a requirement for a Master of Commerce degree programme by Melinda Jone under the supervision of Associate Professor Andrew Maples and Mr Alistair Hodson, who can be contacted at (03) 364 2987 ext. 6636 and (03) 364 2987 ext. 7377, respectively. They will be pleased to discuss any concerns you may have about participation in the project.

This research project aims to seek feedback from selected experts in the areas of tax disputes resolution or mediation on a proposed tax mediation regime developed by the researcher for New Zealand's tax disputes resolution procedures (see **"Researcher's proposed New Zealand tax mediation regime"** attached). This feedback will be used in order to refine the researcher's proposed tax mediation regime. This research project includes two components. The first component involves the completion of the attached survey questionnaire. This is followed by the opportunity for respondents to the questionnaire to participate in a focus group session.

You have been selected as a potential participant in this research project due to your specialist knowledge and/or experience in the area of tax disputes resolution or mediation. You will not be identified as a participant to the research project and you may withdraw your participation at any time.

By completing the questionnaire it will be understood that you have consented to participate in this component of the research project, and that you consent to publication of the results from the questionnaire with the understanding that your anonymity will be preserved.

In addition to completing the questionnaire, I would like to invite you to take part in a focus group session later in the year. While this is only an invitation and you are not required to take part, your willingness to do so would be greatly appreciated. You can indicate your consent to participate in the focus group session by completing the consent form attached to this email.

Participation in the focus group session will involve discussing issues related to the researcher's proposed tax mediation regime for New Zealand. The focus group will comprise of up to eight participants specialising in either tax disputes resolution or mediation. The focus group session will be conducted in English, will take approximately one and a half hours and will be held during the morning (commencing at 7.30am) at a central venue at the University of Canterbury (you will be informed of the exact venue and date by phone/email correspondence). The focus group session will be audio-recorded and transcribed for analysis. The University of Canterbury does not permit us to supply copies of focus group transcripts to participants.

Participation in the focus group session is voluntary. However, if you decide to take part and later change your mind, you are free to withdraw from the session at any stage.

All information provided in the questionnaire and focus group session will be treated as strictly confidential. These responses will only be made available to myself and my supervisors, Associate Professor Andrew Maples and Mr Alistair Hodson. All identifying information will be securely stored and accessible only by the researcher and the supervisors of this project. Furthermore, any results obtained are to be reported collectively without attribution to any particular individual.

This research project has been reviewed and approved by the Department of Accounting and Information Systems, University of Canterbury and the University of Canterbury Human Ethics Committee Low Risk process.

If you have any complaints about any aspect of the project, the way it is being conducted or any questions about your rights as a research participant, then you may contact:

The Chair
UC Human Ethics Committee
University of Canterbury
Private Bag 4800, CHRISTCHURCH
Email: human-ethics@canterbury.ac.nz

Thank you for participating in this research project. I look forward to receiving your response.

Yours sincerely

Melinda Jone
Postgraduate student
Department of Accounting
and Information Systems
University of Canterbury

Andrew J Maples
Associate Professor of Taxation Law
Department of Accounting and
Information Systems
University of Canterbury

Alistair G Hodson
Assistant Lecturer
Department of Accounting
and Information Systems
University of Canterbury

Appendix 3.2: Covering Letter to the Non-Canterbury Participants

College of Business and Economics

Melinda Jone
Department of Accounting and Information Systems
Tel: [REDACTED]
Email: melinda.jone@pg.canterbury.ac.nz



16 October 2012

Survey on the proposed use of mediation in New Zealand's tax disputes resolution procedures

Dear Participant,

You are invited to participate in a research project on the proposed use of mediation in New Zealand's tax disputes resolution procedures by completing the following questionnaire. The project is being carried out as a requirement for a Master of Commerce degree programme by Melinda Jone under the supervision of Associate Professor Andrew Maples and Mr Alistair Hodson, who can be contacted at (03) 364 2987 ext. 6636 and (03) 364 2987 ext. 7377, respectively. They will be pleased to discuss any concerns you may have about participation in the project.

This research project aims to seek feedback from selected experts in the areas of tax disputes resolution or mediation on a proposed tax mediation regime developed by the researcher for New Zealand's tax disputes resolution procedures (**see "Researcher's proposed New Zealand tax mediation regime" attached**). This feedback will be used in order to refine the researcher's proposed tax mediation regime.

You have been selected as a potential participant in this research project due to your specialist knowledge and/or experience in the area of tax disputes resolution or mediation. You will not be identified as a participant to the research project and you may withdraw your participation at any time.

By completing the questionnaire it will be understood that you have consented to participate in the research project, and that you consent to publication of the results of the project with the understanding that your anonymity will be preserved.

Thank you for participating in this research project. I look forward to receiving your response.

Yours sincerely

Melinda Jone
Postgraduate student
Department of Accounting
and Information Systems
University of Canterbury

Andrew J Maples
Associate Professor of Taxation Law
Department of Accounting and
Information Systems
University of Canterbury

Alistair G Hodson
Assistant Lecturer
Department of Accounting
and Information Systems
University of Canterbury

Appendix 4: Sample of the Pre-Notification Email

Subject: University of Canterbury MCom survey: Proposed mediation in NZ's tax disputes procedures (Supervisor: Assoc. Prof. Andrew Maples)

Dear Sir/Madam

We would like you to assist us with a University of Canterbury Master of Commerce research thesis on a proposed tax mediation regime for New Zealand's tax dispute resolution procedures by completing a brief survey. You will be emailed this survey in one week from today.

- It should take you no longer than 15-20 minutes to complete.
- It consists of:
 - A short document to read.
 - 9 'tick-box' answer questions.
 - You can add additional comments if you wish.
- There are no right or wrong answers.
- You will have 4 weeks to complete and return the survey.
- Your participation is entirely voluntary and all information that you provide will be treated as strictly confidential.

Please note that you have been selected due to your specialist knowledge and/or experience in the area of tax disputes or mediation.

Thank you for your assistance.

Yours sincerely

Melinda Jone
Postgraduate Student
Department of Accounting and Information Systems
University of Canterbury
melinda.jone@pg.canterbury.ac.nz

Andrew J Maples
Associate Professor of Taxation Law
Department of Accounting and Information Systems
University of Canterbury

Appendix 5: Samples of the Covering Emails to the Survey Questionnaires

Appendix 5.1: Covering Email Accompanying the Survey Questionnaire to the Canterbury Participants

Subject: University of Canterbury MCom survey: Proposed mediation in NZ's tax disputes procedures (Supervisor: Assoc. Prof. Andrew Maples)

Dear Sir/Madam

We would like you to assist us with a University of Canterbury Master of Commerce research thesis on a proposed tax mediation regime for New Zealand's tax dispute resolution procedures by completing the brief survey questionnaire attached to this email:

- It should take you no longer than 15-20 minutes to complete.
- It consists of:
 - A covering letter and instructions.
 - A short document to read.
 - 9 'tick-box' answer questions.
 - You can add additional comments if you wish.
- There are no right or wrong answers.
- Your participation is entirely voluntary and all information that you provide will be treated as strictly confidential.
- In addition to completing the survey questionnaire, you are invited to attend a focus group session to be held later this year. You can indicate your voluntary consent to participate in the consent form attached to the survey.

To complete the survey questionnaire, please open the word document attached to this email. Once you have completed the survey, please save the changes and return it to the researcher at: melinda.jone@pg.canterbury.ac.nz by **Monday 12th November 2012**.

You have been selected for this survey due to your specialist knowledge and/or experience in the area of tax disputes or mediation. You can indicate whether you would like to be provided with a copy of a summary of the research results, when they become available, at the end of the survey.

Thank you for your assistance.

Yours sincerely

Melinda Jone
Postgraduate Student
Department of Accounting and Information Systems
University of Canterbury
melinda.jone@pg.canterbury.ac.nz

Andrew J Maples
Associate Professor of Taxation Law
Department of Accounting and Information Systems
University of Canterbury

Appendix 5.2: Covering Email Accompanying the Survey Questionnaire to the Non-Canterbury Participants

Subject: University of Canterbury MCom survey: Proposed mediation in NZ's tax disputes procedures (Supervisor: Assoc. Prof. Andrew Maples)

Dear Sir/Madam

We would like you to assist us with a University of Canterbury Master of Commerce research thesis on a proposed tax mediation regime for New Zealand's tax dispute resolution procedures by completing the brief survey questionnaire attached to this email:

- It should take you no longer than 15-20 minutes to complete.
- It consists of:
 - A covering letter and instructions.
 - A short document to read.
 - 9 'tick-box' answer questions.
 - You can add additional comments if you wish.
- There are no right or wrong answers.
- Your participation is entirely voluntary and all information that you provide will be treated as strictly confidential.

To complete the survey questionnaire, please open the word document attached to this email. Once you have completed the survey, please save the changes and return it to the researcher at: melinda.jone@pg.canterbury.ac.nz by **Monday 12th November 2012**.

You have been selected for this survey due to your specialist knowledge and/or experience in the area of tax disputes or mediation. You can indicate whether you would like to be provided with a copy of a summary of the research results, when they become available, at the end of the survey.

Thank you for your assistance.

Yours sincerely

Melinda Jone
Postgraduate Student
Department of Accounting and Information Systems
University of Canterbury
melinda.jone@pg.canterbury.ac.nz

Andrew J Maples
Associate Professor of Taxation Law
Department of Accounting and Information Systems
University of Canterbury

Appendix 6: Samples of the Follow-Up Emails

Appendix 6.1: Follow-Up Email to the Canterbury Non-Respondents

Subject: University of Canterbury MCom survey: Proposed mediation in NZ's tax disputes procedures (Supervisor: Assoc. Prof. Andrew Maples)

Dear Sir/Madam

Recently, I sent you a survey questionnaire as part of my Master of Commerce research thesis at the University of Canterbury on a proposed tax mediation regime for New Zealand's tax dispute resolution procedures.

Please note that the survey questionnaire is reattached to this email as a word document. However, a PDF file is available on request if this is preferred.

If you have already completed and returned the survey questionnaire, I would like to thank you for your participation, and please kindly disregard this reminder.

If you have not yet completed and returned the survey questionnaire and are still willing to participate in the survey, please complete the attached survey questionnaire and return it by email to: melinda.jone@pg.canterbury.ac.nz by **Monday 12th November 2012**.

I would be grateful if you could take the time to complete the survey. Your participation in this research is important in order to obtain meaningful results on a topic which is of a specialist nature.

In addition, if you would like to take part in a focus group interview session later in the year, please complete and return the attached consent form also.

Thank you for your assistance.

Yours sincerely

Melinda Jone
Postgraduate Student
Department of Accounting and Information Systems
University of Canterbury
melinda.jone@pg.canterbury.ac.nz

Andrew J Maples
Associate Professor of Taxation Law
Department of Accounting and Information Systems
University of Canterbury

Appendix 6.2: Follow-Up Email to the Non-Canterbury Non-Respondents

Subject: University of Canterbury MCom survey: Proposed mediation in NZ's tax disputes procedures (Supervisor: Assoc. Prof. Andrew Maples)

Dear Sir/Madam

Recently, I sent you a survey questionnaire as part of my Master of Commerce research thesis at the University of Canterbury on a proposed tax mediation regime for New Zealand's tax dispute resolution procedures.

Please note that the survey questionnaire is reattached to this email as a word document. However, a PDF file is available on request if this is preferred.

If you have already completed and returned the survey questionnaire, I would like to thank you for your participation, and please kindly disregard this reminder.

If you have not yet completed and returned the survey questionnaire and are still willing to participate in the survey, please complete the attached survey questionnaire and return it by email to: melinda.jone@pg.canterbury.ac.nz by **Monday 12th November 2012**.

I would be grateful if you could take the time to complete the survey. Your participation in this research is important in order to obtain meaningful results on a topic which is of a specialist nature.

Thank you for your assistance.

Yours sincerely

Melinda Jone
Postgraduate Student
Department of Accounting and Information Systems
University of Canterbury
melinda.jone@pg.canterbury.ac.nz

Andrew J Maples
Associate Professor of Taxation Law
Department of Accounting and Information Systems
University of Canterbury

Appendix 6.3: Second Follow-Up Email to Selected Non-Respondents

Subject: Gentle reminder: University of Canterbury MCom survey: Proposed mediation in NZ's tax disputes procedures

Dear [name of non-respondent],

Recently, I sent you a survey questionnaire on behalf of one of my postgraduate students at the University of Canterbury undertaking a Master of Commerce research thesis on a proposed tax mediation regime for New Zealand's tax dispute resolution procedures.

You may recall that you had earlier expressed an interest to us in completing the questionnaire. I understand that as you are very busy, you may have overlooked the questionnaire or may not have been able to complete the questionnaire due to limited time or otherwise. However, if are still willing to participate in the survey, we would be grateful if you could please complete the attached survey questionnaire and return it by email to: melinda.jone@pg.canterbury.ac.nz as soon as you are able to.

We would be grateful if you could take the time to complete the survey as your participation in this research is important in order to obtain meaningful results on a topic which is of a specialist nature.

Thank you for your assistance.

Yours sincerely

Andrew J Maples
Associate Professor of Taxation Law
Department of Accounting and Information Systems
University of Canterbury

Melinda Jone
Postgraduate Student
Department of Accounting and Information Systems
University of Canterbury

Appendix 7: Sample of the Focus Group Consent Form

College of Business and Economics

Melinda Jone
Department of Accounting and Information Systems
Tel: [REDACTED]
Email: melinda.jone@pg.canterbury.ac.nz



CONSENT FORM

Research project on the proposed use of mediation in New Zealand's tax disputes resolution procedures

I have read and understood the description of the above-named project. On this basis I agree to participate as a focus group participant in this project, and I consent to publication of the results of the project with the understanding that anonymity will be preserved. I also consent to being tape-recorded during the focus group session.

I understand that I may at any time withdraw from the project, including withdrawal of any information I have provided.

I note that the project has been reviewed and approved by the Department of Accounting and Information Systems, University of Canterbury.

Name:

Date:

Contact phone number:

Appendix 8: Focus Group Questioning Route

Opening question

- Tell us your name, occupation and where you work.

Introductory/transition question

- What were your initial thoughts on the researcher's proposed New Zealand tax mediation regime?

Probes:

- What are the strengths of the proposed regime? Why?
- What are the weaknesses of the proposed regime? Why?

Key question

- What changes would you make to the features of the researcher's proposed New Zealand tax mediation regime and why?

Probes: (give priority to questions in italics if running out of time)

- Who should the mediator be?*
- What background and qualifications should they have?*
- Could the mediator be a TRA judge?*
- How should the confidentiality provisions operate?
- Should mediation be mandatory?*
- Why/why not?*
- When should the mediation phase occur?*
- Should mediation replace the conference phase? Or replace facilitated conferences?*
- Should mediation only occur once in the tax disputes resolution process?*
- *Why/why not?*
- Should certain types of disputes be excluded from mediation? (for example, as suggested in Table 1)
- On what basis should this be determined?
- Who should make this determination?
- How should the mediation services be funded?*
- Should the mediator be able to make a recommendation on the dispute at the request of the parties?*
- Should the parties be able to reject the mediator's recommendation?

Ending question

- Are there any other issues that anyone wants to raise with respect to the proposed mediation regime?

Additional questions (if there is time remaining at the end)

- What implementation issues (if any) should be considered with respect to the researcher's proposed New Zealand tax mediation regime?

Probes:

Is a change in attitude (that is, a 'culture change') required by:

- Inland Revenue?
- Taxpayers?
- Tax practitioners?

Appendix 9: Questions for Video Conference with Inland Revenue Staff⁵

Note that in the following questions the term ‘conference phase’ includes both unfacilitated and facilitated conferences unless the question specifically refers to facilitated conferences.

1. How are Inland Revenue penalties dealt with during the conference phase if there is a resolution of the dispute at that stage?
2. If it is apparent that there may be an issue with collecting an amount of tax (e.g., the dispute may be resolved at the conference with the taxpayer owing an amount to the IRD), can instalment options/relief/debt remission be discussed during the conference phase?
3. Who from Inland Revenue has authority to negotiate and settle at the conference phase and must they be present at the conference?
4. As the conference is an administrative process, are there circumstances where Inland Revenue would not offer a conference to taxpayers? If so, what would these circumstances be? [I note that in the withdrawn SPS 08/01, paragraphs 228-232 (regarding the conference not being held or being abridged), do not appear in the current SPS 11/05 SPS and 11/06. To what extent do the withdrawn paragraphs 228-232 still reflect current Inland Revenue practice?]
5. If more than one conference meeting is deemed necessary, who ultimately decides that there will be a further meeting(s)?
6. What level of tax knowledge does a facilitator require to conduct a facilitated conference? (i.e., what level of knowledge constitutes: “sufficient technical knowledge to understand and lead the conference meeting”? (SPS 11/05, para 145)) Could a facilitator with limited tax knowledge in the area of tax law in dispute conduct a facilitated conference?
7. Is there a separate unit/department/team in Inland Revenue for overseeing the administration of the conference phase?
8. In facilitated conferences, how are facilitators selected/ appointed for a particular dispute?
9. Who (i.e., what are their roles) and how many from each party (Inland Revenue and the taxpayer) are usually present at the conference meeting?
10. While the SPSs state that the conference phase is generally expected to be completed within three months, what is the average length of the conference phase in practice?

⁵ Note that, Inland Revenue’s responses to only a selected number of the following list of questions have been incorporated within this thesis (see Chapters 8 and 9) given that the main purpose of the questions was to provide a contextual background to, as well as a clarification in understanding of the research findings in relation to Inland Revenue’s conference phase. Also note that, Inland Revenue staff were not able to provide answers to some of the questions listed.

11. Are there any statistics which show improvements to the conference phase resulting from conference facilitation? (e.g., savings in time and cost, improvements in rates of resolution).
12. SPS 11/05, para 148 states that a conference meeting need not be face-to-face (e.g., it can be by telephone or video conference). In practice, which of these formats is the most common?
13. The 2008 NZLS/NZICA joint submission noted that the conference was being used by Inland Revenue as an opportunity for information gathering as opposed to a forum for resolution. Is this still the case (i.e., since the introduction of facilitated conferences)? To what extent is the conference phase focused on (a) resolving the dispute and; (b) obtaining settlement?
14. Are there perception issues with taxpayers with respect to Inland Revenue facilitators being able to perform their roles in an unbiased and independent manner?
15. Is there 'ring-fencing' of facilitators? (i.e., similar to in Inland Revenue's Adjudication Unit.)
16. Taxpayers can have many different objectives when entering into the conference phase (e.g., the taxpayer may be looking for further information or clarification or they may be prepared to fully dispute the issue or achieve a compromise). In practice, which objective(s) are the most common?
17. In practice, does the conference phase alleviate or promote entrenchment between the two parties?
18. In practice, do taxpayers use the conference as a delaying tactic and if so, how often does this occur?
19. How is it determined that there has been "meaningful participation" (SPS 11/05, para 174) by the taxpayer in the conference phase?
20. For the purposes of time and cost efficiencies, would it be feasible to limit the conference phase to one meeting?
21. Is the training that the facilitators receive one-off or are there on-going skill/ training requirements?
22. What material does the facilitator receive prior to the conference (can they seek clarification from Inland Revenue or the taxpayer in advance of the conference if they are unclear about certain aspects of the dispute?)
23. Should the facilitator adopt a more evaluative function? (i.e., should the facilitator be able to recommend a solution to the dispute?)
24. How do you measure the 'success' of a conference/ facilitated conference?

25. In practice, do taxpayers actively partake in the conference/facilitated conference meeting or do they employ representatives/advisors to act on their behalf?